United States Senate

Impeachment Trial Committee

Impeachment of Judge G. Thomas Porteous, Jr., U.S. District Judge For the Eastern District of Louisiana

Volume IV

Thursday, September 16, 2010

Dirksen Senate Office Building

Washington, D.C.

APPEARANCES:

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APPEARANCES (Continued):

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P R O C E E D I N G S (8:11 a.m.)

CHAIRMAN MC CASKILL: We are ready to proceed with Judge Porteous's case.

Mr. Turley?

MR. TURLEY: Thank you, Madam Chair. Could we raise a housekeeping issue? You asked me to confirm at the outset of our witnesses. We're going to proceed as we were in order.

As you know, the Senate committee asked us to take Judge Bodenheimer out of order. He was a House witness. We put him second. And there's another witness, Mr. Gardner, that we were also asked to take, it was another House witness. We'll be taking him today as well.

But we won't be able to move him up like Judge Bodenheimer, because we've got bankruptcy people that have to catch flights. So we'll try to get through the bankruptcy people and then do Mr. Gardner, and they will all be done today.

CHAIRMAN MC CASKILL: Okay. Could you tell me, are all of the people on your list, with the exception of Gardner, bankruptcy people today?

MR. TURLEY: No, no.

CHAIRMAN MC CASKILL: So how many

Gardner?

MR. TURLEY: That we're still trying to confirm. I know that we're going to proceed with -- we're going to have Professor Pardo, we're going to have Barliant, and then Beaulieu. We're sure -- they're all here and waiting.

Then we'll be able to confirm -- but we're trying to stay in the order that we gave the committee.

CHAIRMAN MC CASKILL: So perhaps Gardner would go after Beaulieu?

MR. TURLEY: We're not sure yet. We have to --

CHAIRMAN MC CASKILL: Okay. All right.

MR. TURLEY: One other issue, with the indulgence of the chair, we do have an issue we wanted to raise on the record. As you know, last night the committee informed us that we were -- we were planning to try to call Mr. Petalas, who is a Department of Justice attorney. We were informed the committee has decided not to subpoena him. We understand that.

What we would like to get on the record and that we're very, very thankful to the committee's efforts to get material from the Justice

Department, and we've had glimpses of how difficult that is. We want to thank you for that, and I know you've been personally involved in that.

We only have, as you know, two days left for our testimony. The problem we're facing is, with Petalas out, we are fairly confident that there's material related to the investigation at the Department of Justice.

The reason this issue has come up again is that in Mr. Bodenheimer's testimony, he mentions that he was interviewed maybe 30 to 40 times. And as you know, he's a critical player in this Wrinkled Robe matter, which we raised in the opening statement.

We don't have 302s for nearly that number, and we also found out a witness today is going to say that that witness was also interviewed many more times than we thought.

So what we would like to ask the committee to consider is to re-approach the Department of Justice and see if they would be willing to give us the memoranda related to the decision not to prosecute Judge Porteous and specifically raise the fact that we have new testimony from witnesses indicating that there were a lot more interviews

than we've seen.

If they were willing to give us some of that, we could probably work it into Tuesday and actually get it into the record. So we are raising that with the committee and asking if you can help us, we would greatly appreciate it.

CHAIRMAN MC CASKILL: Well, we will -- we have and we will continue to try to get as much information as possible. Everyone can remember the testimony, it was my recollection that Judge Bodenheimer said he'd been interviewed 30 to 40 times about this. But that would include the House, that would include any -- I'm sure that he had times he was interviewed for judicial discipline, either his case or Judge Porteous's case.

So I don't -- I don't know that we're looking for 30 or 40 302s.

MR. TURLEY: Yes, I actually think you're right, Madam Chair. We're probably not looking for 30 or 40. But one of the things we were concerned about is in his testimony, he directly contradicted those two big statements we were raising that had been cited a lot.

And once again, it makes us wonder what material is still there, because he directly

contradicts the meaning of those statements.

CHAIRMAN MC CASKILL: Well, we will -- we will be happy to take another round at the Justice Department.

MR. TURLEY: I appreciate it.

CHAIRMAN MC CASKILL: They are adamant that they have provided all of the information that is relevant to this proceeding. But we will take another round. I will personally make another phone call and inquire and make sure that there is -- I'm happy to do that.

We have done it before and we'll do it again, and we'll see if there's anything else that we will wrangle out of them.

MR. TURLEY: Thank you.

CHAIRMAN MC CASKILL: They have, in fact -- even though I'm very disappointed how difficult it was to get the information we got, they did produce a significant amount of information. It was very late in the process, but I think we were able to get much more than they originally intended on giving us.

MR. TURLEY: We do know your staff turned that over immediately as soon as your staff got it. We are still trying to get the memo. We got only

the letter, but we're trying to get the memo from the Department of Justice.

CHAIRMAN MC CASKILL: I don't think they're going to give you the memo. I'll just tell you, I think they believe that invades a number of different privileges they have, which is the nub of the matter, whether or not we have the right to invade their deliberative process as it relates to a decision to prosecute.

MR. TURLEY: We appreciate your efforts in that regard.

CHAIRMAN MC CASKILL: Thank you.

MR. SCHIFF: Madam Chair, I just wanted to express the House view that the two statements that counsel is referring to, that once he was a judge no one -- he would never have to pay for his lunch again and the other more profane comment, in contradiction to what Mr. Turley said, those statements were not contradicted by Mr. --

CHAIRMAN MC CASKILL: Bodenheimer.

MR. SCHIFF: Thank you, by Mr. Bodenheimer. In fact, he corroborated and said that's exactly what he said. Now, he gave a different slant to it, but there was no contradiction that the statements were made.

CHAIRMAN MC CASKILL: Okay. Now we've both had a little argument this morning.

MR. TURLEY: To get us started without coffee.

CHAIRMAN MC CASKILL: To get us started we have a little argument outside the evidence. But we will start with the witness, please.

And let me on our end, housekeeping, we will take the witness Pardo. We will take a morning break at 9:30. And we will break until 11:00, because we have a vote at 10:45, and most of the members of the committee have committee work they have to do in a business session, both in Judiciary Committee and Foreign Affairs.

We will then come back at 11:00, and we will hopefully be on the next witness. If not, we'll finish Pardo.

We will then have to take a vote break at noon. Now, this is important for everyone who is here, and for those who are not here, to spread the word.

We actually have the opportunity to work after the vote before lunch, and I think that is maybe the biggest challenge, is to get everyone back here at 12:15 and stay until 1:00. Right?

Especially for my colleagues that could have an excuse to leave at 12:30 if they didn't know that we don't really start talking in caucus until 1:00; right?

So 12:15 to 1:00 we would come back and work. Then we would break for lunch until 2:00 or 2:15 probably, more likely. And then we would continue. And it is our intention to stop at 6:00 today. So that's why I'm anxious to make sure we get Mr. Gardner in.

For the record, this was a little bit of a mess. Mr. Gardner, I think is a judge, isn't he? No?

MR. TURLEY: No, Madam Chair.

CHAIRMAN MC CASKILL: Mr. Gardner had an accident and was saying that he couldn't come. And so we agreed to have him come next week. In the meantime, evidently, that was not communicated to him, and he got on an airplane.

MR. TURLEY: Right.

CHAIRMAN MC CASKILL: So he is here, and he's cranky. And we don't want to spend the money to fly him back again and then come back again next week.

So I think it would be much better for

us -- and I didn't mean that in a pejorative way, that he's cranky. I was trying to be humorous. Probably on the record it won't look so humorous.

But I think it's important that we get to him today so that we either don't have to pay for a hotel room through the whole weekend or not paying the round trip flight.

MR. TURLEY: We actually left a message and didn't reach him before he got on the plane. We will get to him today and we promise that.

CHAIRMAN MC CASKILL: Okay.

MR. TURLEY: At the time the defense will call Professor Rafael Pardo.

CHAIRMAN MC CASKILL: While the witness is coming, I would ask the members also to begin to look at their calendars as -- if we finish this trial, the staff will have some time to work on a report.

We are going to have to come back and vote on that report prior to when we reconvene. And I'm going to need everyone to look at their calendars and decide whether they would like to come back to vote on the report on -- late in the week, after the election, which would be the Thursday or Friday after the election, or whether they would prefer to

come the Monday after the election, which I believe might be Veteran's Day.

No, which day is Veteran's Day? Wednesday is Veteran's Day. So the Monday is not Veteran's Day.

So if you all would check and begin to give us feedback. If you would prefer to fly back, it will be a couple hours, the committee meeting.

You will have the report ahead of time to review and give input to the staff. You're not going to have to come and read the report and do something at that committee meeting. You will have plenty of time ahead of time, at least a week, to have the report and look at it.

But we are going to have to come back, just this committee, for a meeting prior to the Senate reconvening on the 15th of November, so everyone can start working with their schedulers on that.

I'll need you to stand, sir. And I apologize, Professor, I do not know what your first name is.

THE WITNESS: It's Rafael.

CHAIRMAN MC CASKILL: Rafael Pardo; right?

RAFAEL PARDO

was called as a witness and, having first been duly sworn, was examined and testified as follows:

CHAIRMAN MC CASKILL: Your time as we begin the day, Judge Porteous has nine hours and 53 minutes, and the House has eight hours and 21 minutes.

DIRECT EXAMINATION

BY MR. WALSH:

Q Good morning, Professor Pardo.

A Good morning.

Q Could we call up Porteous Exhibit 1097 on the screen, please.

Is Exhibit 1097 your CV, Professor Pardo?

A Yes, it is.

MR. WALSH: Madam Chair, we would offer 1097 at this time.

CHAIRMAN MC CASKILL: Objection?

MR. SCHIFF: No objection, Madam Chair.

CHAIRMAN MC CASKILL: It will be received.

(Porteous Exhibit 1097 received.)

BY MR. WALSH:

Q Professor, you have a bachelor's degree from Yale?

A I do.

Q Law degree from New York University?

A I do.

Q Were you a member of the law review?

A Yes, I was.

Q Following graduation, did you clerk for a bankruptcy judge in New York City?

A I did.

Q Did you work for a major law firm in New York practicing in bankruptcy?

A Yes.

Q You began your academic career as a professor at Tulane; is that right?

A That's correct.

Q When you were living in New Orleans, did you have occasion to meet Judge Porteous?

A I did not.

Q When is the first time you met Judge Porteous?

A Yesterday.

Q After your time at Tulane, you moved to Seattle University, where you received tenure; is that correct?

A That is correct.

Q And just this past summer you moved across town to the University of Washington; is that right?

A That's also correct.

Q You are a full professor with tenure?

A I am.

Q What are the principal areas in which you teach?

A I teach bankruptcy, commercial law courses, which focus on the Uniform Commercial Code. I've predominantly taught Articles III and IV of the Uniform Commercial Code, so negotiable instruments, bank collections and deposits. I've taught contracts.

Q If we could look at page 2 of your CV. It continues onto the third page, but starting on page 2, is that a list of your publications?

A Yes, it is.

Q Do all of the articles listed in your CV relate in some way to bankruptcy or financial restructuring or debtor/creditor issues?

A They do.

Q You're a member of the editorial board of the American Bankruptcy Law Journal?

A Yes, I'm one of the two academic members.

Q In addition to teaching and researching, do you have occasion to provide legal advice to consumers?

A I do. I volunteer for the King County Bar

Association Debt Clinic, which provides advice to individuals who are considering filing for bankruptcy or have begun the process of filing for bankruptcy on their own.

Q Have you testified before Congress before?

A I have, about a year ago I testified before the House Judiciary Committee's subcommittee on commercial and administrative law regarding bankruptcy issues and the discharge of student loans.

Q Are you being compensated for your testimony today?

A I'm not. I'm only -- my expenses are being reimbursed by my institution, and I would also add that I'm here in my individual capacity, and I don't represent the views of my institution.

MR. WALSH: We would tender Professor Pardo as an expert in matters of bankruptcy law at this time.

MR. SCHIFF: No objection, Madam Chair.

CHAIRMAN MC CASKILL: He will be considered an expert by the panel.

BY MR. WALSH:

Q Professor Pardo, what sorts of information did you review to prepare for your testimony here

today?

A I predominantly reviewed the materials relating to Judge Porteous's Chapter 13 bankruptcy filing, including the docket, the schedules, the petition, the notice of the commencement of the case, transcripts of the creditors meeting. I also reviewed documents relating to proceedings leading up to his impeachment and testimony provided by various participants.

And I referred to the House committee -- the House Judiciary Committee's report accompanying the articles of impeachment.

Q Were you present in the courtroom yesterday when Judge Keir described the effect of the delivery of a negotiable instrument on an underlying obligation?

A I was.

Q In your view, did he accurately state the law on that issue?

A He did not.

Q Did you hear Mr. Lightfoot state that a marker is a promise to pay?

A I did.

Q Was that an accurate statement, in your view?

A It was not.

Q Several people in this proceeding have described Judge Porteous's use of markers as gambling on credit. Is that an accurate statement, in your view?

A It is not.

Q Legally speaking, is there any difference between buying gambling chips with a marker and buying potato chips with a check?

A There is not.

Q I want to ask you about a few specific differences between Chapter 7 and Chapter 13. I'm going to try and skip over issues that other witnesses have covered already so we can move this along.

But let me ask you about the King County Debt Clinic that you referred to a moment ago.

In your work with the clinic, do you advise consumers about the relative benefits of Chapter 7 versus Chapter 13 for their particular financial situations?

A I do.

Q What sort of situations would a consumer be better off choosing Chapter 13 over Chapter 7?

A There are a couple of instances. A lot of

those instances relate to the debtors wanting to retain certain assets and whether that's to keep the home, which there are means to do so in Chapter 13. But in Chapter 7, it would be very difficult, if not impossible, to keep your home.

Sometimes to restructure debts owed to secured creditors, such as a secured creditor who has a lien on your car and to restructure that debt.

There's also the possibility of using Chapter 13 to manage difficult types of debt, such as tax debt. There are a variety of reasons why an individual would consider 13 or 7.

Q Let's talk about the two chapters again. Let's talk about the discharge in the two chapters. What are the sorts of things that could cause a debtor in a Chapter 7 case to have a discharge denied, that is no debts are discharged?

A Well, as an initial matter, the Bankruptcy Code is very specific that the court must grant the debtor a discharge, unless one of the enumerated statutory grounds exist for denial of discharge. So absent one of those exceptions, the court has no discretion to deny a discharge.

So some of the grounds for denying discharge include knowingly and fraudulently making

a false oath, an account in a Chapter 7 case. So here I think it's important to note that if one knowingly makes a false oath or account in a Chapter 7 case, that is not the basis for denial of discharge.

Another ground is refusing to obey a lawful order of the court in the debtor's bankruptcy case. So those are a couple of examples that would be the basis for denial of discharge.

Q Okay. Do those provisions for denial of discharge apply in a Chapter 13 case?

A They do not. The only basis to deny a discharge in Chapter 13 is if the debtor does not complete all payments under the plan.

Q Okay. Now, let's take the situation where a debtor has gotten a discharge but it might be revoked. What are the bases on which a Chapter 7 debtor's discharge could be revoked after it's been granted?

A So there are a variety of grounds. One is if the fraud was -- the discharge was obtained through fraud by the debtor and the creditor only learned of the fraud after discharge was granted.

Another possibility is that the debtor acquired estate property and knowingly and

fraudulently kept that estate property and didn't turn it over.

And then the third possibility is at the time that Judge Porteous filed, the bankruptcy laws then in effect, if a debtor failed to follow a lawful order of a court in the debtor's case.

Q What are the grounds for revoking a discharge in a Chapter 13 case?

A So in Chapter 13, the only basis for revoking a discharge is if that discharge was obtained through fraud.

Q And what's the period of time in a Chapter 13 case that someone could try to revoke a discharge?

A One year after the grant of discharge.

Q Now, the differences you've just talked about between discharges in Chapter 7 and Chapter 13, were those developed by the courts or enacted by Congress?

A They were enacted by Congress. And I think here it's very important to note that the system, as it's structured, is not a strict liability system regarding what the effects of nondisclosure are.

That is, there is a range of responses

that both the courts and participants in the bankruptcy system can use to address nondisclosures.

And I think it's important to note that Congress made a meaningful and intentional policy choice to say we will not deny a discharge, for example, to a Chapter 7 debtor who knowingly makes a false oath or account.

And likewise, Congress made the knowing and intentional choice to say we will not deny a Chapter 13 debtor a discharge if they knowingly and fraudulently make a false oath or account in a case.

That's not to say that Congress condones such nondisclosures or false fraudulent and knowing statements, but it reflects the fact that Congress thinks we need to let bankruptcy courts be nimble and have the ability to deal with a variety of scenarios and determine what is the appropriate response.

Q What's the underlying policy justification for making it somewhat easier to get a discharge in Chapter 13 than it is in Chapter 7?

A Well, much of this relates to the differences in repayments under the two chapters. So in Chapter 7, one turns over one's assets to a trustee, they get liquidated, and those assets are

used to pay creditor claims.

The reality is that anywhere from 95 to 97 percent of all consumer Chapter 7 cases are no-asset cases, there are no distributions made to general unsecured creditors.

On the other hand, debtors who have future income might be able to repay their creditors, but that future income cannot be received in Chapter 13.

So Congress as a policy choice has used an incentive approach or a carrot, if you will, to try and attract debtors to Chapter 13 by giving them certain added benefits, and one of these benefits would be limited grounds for denial of discharge, mainly not completing your plan.

And the hope is that by attracting more debtors to Chapter 13, you will increase creditor repayments through the use of future income.

Q Professor Pardo, let's look at the year 2001, when Judge Porteous and his wife filed their Chapter 13 case. About how many debtors filed under Chapter 7 in 2001?

A Approximately a million or more than a million, but slightly more than a million.

Q About how many debtors filed under Chapter 13 in 2001?

A Approximately 400,000.

Q All right. Let's talk about notice in a Chapter 13 case. The first step in a bankruptcy case, of course, is to file a bankruptcy petition. We've heard a lot about that during this proceeding already.

But I want to ask, does the petition get sent to creditors?

A It does not.

Q How do creditors get notice of a bankruptcy filing?

A Creditors get notice of a bankruptcy filing from -- at the time of Judge Porteous's filing, through the clerk's office, there would be a notice of commencement of the case, as well as notice regarding the 341 meeting, that is the meeting of creditors.

Q And could we pull up House Exhibit 128 on the screen, please. I believe it's already in evidence.

Is Exhibit 128 an example of a notice of commencement of a bankruptcy case?

A Yes, it is.

Q And, in fact, it's the one in Judge Porteous's bankruptcy case; right?

I want to walk through very quickly with you the sorts of information that are included here that are provided to creditors. So, for example, it tells creditors it's Chapter 13 rather than some other chapter; right?

A That's correct.

Q And it has the debtors' names and Social Security numbers; right?

A Yes.

Q Tells them what date the case was commenced?

A That's correct.

Q Tells the creditors when they have to file a claim, if they choose to file a claim?

A That's correct.

Q Tells them when the 341 meeting or initial meeting of creditors is held; right?

A That's correct.

Q Tells them when the confirmation hearing on the plan will be held; right?

A Yes.

Q It's got a few data points about the plan. We heard some testimony about that yesterday; right?

A Yes, that's correct.

Q It tells them who the trustee is and who

the debtor's counsel is; right?

A That's correct.

Q Okay. If a debtor omits a creditor from the debtor's schedules, liabilities, what's the significance of that for the debt that's owed to that creditor?

A The debt will not be discharged. And the reason for this is the notion of constitutional due process and fair notice. And not having received notice of the commencement of a case, the debt would not be discharged in Chapter 13.

Q You talked about the possibility that a debtor would fail to make all the payments under the plan; right?

A That's correct.

Q Are there studies about the frequency with which that happens in Chapter 13 cases?

A Yes, there are.

Q What do those studies show?

A They show a range of figures, but most of them show that more than 50 percent of Chapter 13 cases fail, and the numbers are really closer to anywhere from two-thirds to three-quarters fail.

Q Okay. Let's go into a little more detail about what it takes to confirm a Chapter 13 plan,

then. There are a number of statutory requirements; right?

A That's correct.

Q Okay. Could we pull up the demonstrative on the requirements. We've heard a lot about best interest of creditors in some of yesterday's testimony and how assets can be relevant in a Chapter 13 case. So I want to ask if we could go to page 5 of the demonstrative.

Is the statutory language that's on the screen here, is that what bankruptcy practitioners commonly refer to as the best interest of creditors test?

A That's correct.

Q And why is that an appropriate name for statutory language that does not even use the word "best interests"?

A Well, the basic idea behind the best interest test is that if a debtor chooses to file for Chapter 13, the creditors should be no worse off than they would have been had the debtor filed for Chapter 7.

So that intuition makes sense. You want to have Chapter 7 be the baseline. And so what the test looks to ascertain is whether the creditors

would have received as much as they would have in a Chapter 7 case.

Q We have another demonstrative I'd like to pull up, and we have a hard copy of this one as well.

So could you tell us, Professor Pardo, in general terms, what's being shown by the chart that we have on screen now?

A So the chart is looking to illustrate both -- not only the net amount that was paid to Judge Porteous's general unsecured creditors in his Chapter 13 case, but also various outcomes that would have occurred under a best interest test, both under Judge Porteous's -- one condition the second bar shows what would have been paid according to Judge Porteous's schedules, and the third bar on the right indicates if all of the amounts that are alleged that ought to have been disclosed and if somehow they would have made it into the case. And it's to show what would have been paid.

And then both of these amounts can be compared to the amount that was actually paid to figure out whether or not the disclosure of these assets in any way would have affected an analysis of the best interest test.

Q Okay. And so the bar on the left are the actual payments under the actual Chapter 13 case that we're talking about; right?

A Right. And I believe that that was $52,567.

Q Okay. The middle bar is a calculation of the best interest test based on what was actually disclosed in this case; correct?

A Right. So that would be the equity in his home, as well as his Bank One account, as stated in schedule B. And I believe it's $25,017.

Q Okay. And the chart on the right is -- the bar on the right is the one we're going to talk a little bit about in a second, the hypothetical analysis, what other things had been disclosed, how would the best interest test come out?

A That's right. I believe those amounts total $33,677.

Q Let's break down on the right. Light blue, largest piece by far is the home equity.

A That's correct.

Q How do you calculate home equity in a scenario like this, if we can go to the third page of the demonstrative?

A Well, again, recall that the test is

figuring out what the creditors would have received in Chapter 7. So you have to -- you have to determine how this asset would have been administered in the Chapter 7 case, if the asset were going to be liquidated, to then figure out what amounts would be available for distribution to the unsecured creditors.

So you'd begin with the value of the asset that's to be liquidated. So here we assume, in the exhibit, it's being assumed that the value of the home is $235,110. This was the value -- the current market value listed in schedule A.

And moreover, this was the value that was fixed in the confirmation order by the court.

I should note that this valuation standard is one that is -- that works against Judge Porteous in the sense that current market value is a higher valuation than what one would obtain in a liquidation value. So this hypothetical assumes a scenario that is actually not favorable to Judge Porteous. It's an inflated amount. But we can work with that.

Q Okay. And what are the deductions that you take from the value?

A Well, sir, to administer this asset,

before the trustee can make any distributions to general unsecured creditors, the bankruptcy code in Chapter 7 requires that the trustee first dispose of any interests in property held by a creditor, and such interests can include a lien.

First the trustee would have to account for the first mortgage, subsequently the second mortgage. And then before any distributions are made to unsecured creditors, the debtor is entitled to claim an exemption to which he or she is entitled under either -- under state law or the Bankruptcy Code, whichever might be applicable.

And then once that detection has been made, of course, the trustee is then going to proceed to try and liquidate the asset. The trustee will incur costs associated with this. And so presumably, there would be a real estate commission, and to the person tasked with selling the home.

And then there would be the costs to the trustee for administering the asset, and statutorily under the Bankruptcy Code, there is a rate according to which percentage of fees that are granted to Chapter 7 trustees based on the amount distributed to creditors.

So all of these amounts have to be

accounted for. The trustee will be paid for his costs, any administrative costs will be paid before unsecured creditors. So that would leave roughly $24,900 from the liquidation of the home, assuming a high market value.

Q And that amount is the same in the middle bar and the right bar on the demonstrative; correct?

A That is correct. They would not change.

Q We can go back to the first page that's the same one we have on the easel here.

So on the bar on the right, let's go bottom to top and talk about the assets quickly.

A Yes.

Q We've done home equity. The next two bars are financial accounts; correct?

A That's correct.

Q And how did you determine what balances to include for purposes of this chart?

A So we can begin, for example -- we'll work from bottom to top, if that works.

And so I believe that the one above the blue bar, the home equity, I believe that's the Fidelity account.

Q Right.

A For, if I'm looking at this correctly, it

was roughly $283 or -- in gross.

And then after that, the yellow is the Bank One checking account. For there the assumption is that it would have been the $2200 that's being argued that should have been disclosed, giving the account balance on March 27.

The next one is the tax refund, which was $4100 and maybe $4137 gross.

Then there's the $1500 Treasure Chest payment for redeeming the marker, $1500. And then finally the alleged Fleet preference, which was $1088 in gross.

And I should note, the amounts represented are not the actual gross amounts but they are net amounts. What have been deducted is -- again, the test is what would unsecured creditors have received in a Chapter 7 case.

And as I mentioned before, the trustee is entitled to compensation for administering assets and making distributions. And so those gross amounts have been reduced by the percentage that would have been paid by the trustee.

That said, into this exhibit are not factored in any other costs that the trustee would have incurred in connection with, for example,

recovering a preference or trying -- making sure that the tax refund was recovered. So none of those costs are included.

Of course, if you included those costs, it would reduce the amounts further.

Q Okay. Now, let's back up a step or two. When we're talking about the preferences, let's go to basic principles for a minute.

Is there anything wrong with the debtors making payments to a creditor within the 90 days before a bankruptcy filing?

A There is nothing technically wrong. These are legally -- legal debts due in owing when the debtor pays a creditor prebankruptcy. It's just that once there's a bankruptcy filing, hindsight tells us, well, given the purpose of equality of distribution, it would have negative economic effect on creditors as a whole, so we have to recover it.

But it's only hindsight that tells us that it shouldn't have happened.

Q Does a trustee need to show fraudulent intent or other bad behavior by the debtor or creditor to recover preference?

A None at all. The focus of preference is merely on economic effect.

Q Now, for purposes of the hypothetical we've been assuming these are preferences, so let's go away from the hypothetical for just a moment.

A Sure.

Q In your opinion, was the payment that was made to the Treasure Chest Casino a recoverable preferential transfer?

A Which payment are you referring to?

Q I'm sorry, redeeming the marker.

A Redeeming the marker. Well, in my view, there are strong arguments to suggest that it was not a preference. And you could take one of two views as to why it would not constitute a preference.

The first is that one of the elements to prove a voidable preference is that it be a transfer to the creditor on account of an antecedent debt. Now, one could take the view what was occurring here was Judge Porteous was purchasing back a marker, which is a negotiable instrument, which is property.

So one could start off with the view this is just the repurchase of property.

Now, the argument against that might be, well, no, really it isn't a transfer on account of an antecedent debt, because there is a contingent

liability on the market, there's no actual liability, there's a contingent liability, in the sense that if that marker were at some point to be dishonored, then Judge Porteous would have been liable on the instrument. So that might be the response that no, what's happening here is because there's a payment on a contingent liability.

If one chooses to take that view, again, the requirement that has to be proved for a preference is that the payment is on account of an antecedent debt. So that requires you to figure out when the transfer occurred and to establish that the debt existed before the transfer.

And for purposes of defining antecedent debt for the preference provision, the Federal Circuits are split as to when a debt is deemed to arise for preference purposes. And some circuits take the view that a debt does not arise until it is -- until the debtor first becomes legally bound to pay, legally bound to pay.

And so at the time that the marker -- the Treasure Chest was in possession of the marker, at that point in time, Judge Porteous had no legal obligation to pay the marker.

And so under the view that a debt does not

arise for preference purposes until there's actually a legal obligation to pay, there wouldn't have been an antecedent debt.

So instead what you would have had is a simultaneous exchange of property for a simultaneous debt.

Q Is it fair to say that the law, particularly in 2001, was in a state of some uncertainty about how you would treat the redemption of the Treasure Chest markers?

A I'm sorry, could you repeat the question?

Q Is it fair to say in 2001 the law was in somewhat a state of uncertainty as to how the payment to Treasure Chest would be treated for preference purposes?

A Yes.

Q How about the payment made by Judge Porteous's secretary to Fleet on the credit card? In your view, was that a voidable preferential transfer?

A Again, one of the key elements to proving a voidable preference is that it be a transfer of an interest of the debtor in property. So the payment that was made did not come from any of Judge Porteous's property, it came from the account of the

third party. So you have no transfer of interest of the debtor's property at that point, so it wouldn't satisfy the first element of the preference.

Q So nevertheless, going back to the hypothetical, nevertheless you've included these amounts in the chart for purposes of analysis in the best interest of creditors test; correct?

A I have.

Q So recognizing that we talked about a number of assumptions, when you put all the pieces together in the hypothetical Chapter 7 on the right, what do you calculate to be the recover in that hypothetical Chapter 7 case?

A It would have been $33,677.

Q That's still about $19,000 less than the creditors actually get in the actual Chapter 13 case; correct?

A That's correct. And so the best interest test, again, it looks to ascertain that creditors are no worse off in Chapter 13 than they would have been in Chapter 7. The requirement of this, of course, is that you have to pay more than they would have gotten in a Chapter 7 because of the time value of money.

There is the confirmation requirement, the

language of that requirement specifies that you have to discount the future payments back to present value.

If you -- and so one way to think about it is that you basically, as the debtor, have to pay interest on the amount that the creditors would have received in Chapter 7. And so even under the scenario on the third bar chart, the $33,167, that would, in essence, be as if Judge Porteous had paid 16 percent interest.

And at around the time of his bankruptcy filing, the prime rate was 6 and three quarter percentage points. So this would have been almost 10 percentage points above prime.

And I can't imagine that any bankruptcy court would have denied confirmation, saying that insufficient interest was being paid to the general unsecured creditors.

Q Professor Pardo, let's go to the disposable income test now.

If we could put back up the confirmation requirements demonstrative on page 9 in particular.

So here we're talking about Section 1325(b) of the Bankruptcy Code, but there's an initial question, when does Section 1325(b) come

into play?

A So the projected disposable income requirement only gets triggered if a trustee or unsecured creditor objects to plan confirmation.

Q If nobody objects, the judge never has to get to this; right?

A Right. If there's no objection to plan confirmation, there's no requirement to project your disposable income.

Q Can you give a one-sentence summary of what the disposable income test requires?

A It essentially requires that any excess income above the amounts you need for reasonably necessary expenses to live be devoted, at the time of Judge Porteous's bankruptcy filing, for a three-year period, beginning once payment started under the plan.

Q Can we go to the next page, please? And disposable income is defined in the Bankruptcy Code as we're seeing on the screen now; right?

A That's correct. Which means you start out with whatever the debtor's income is, and courts generally begin with net income, and from that then they deduct reasonably necessary expenses. Then that gives you disposable income.

Then that disposable income has to be projected.

Q As a practical matter, how do trustees and judges and debtors calculate disposable income in a bankruptcy case? What do they look at?

A So back in 2000, their basic approach was you start off with the net amount listed in schedule I, you deduct from that the amount from schedule J for expenses and multiply that by 3.

Q Do trustees examine the projected expenses the debtors include on schedule J?

A Absolutely.

Q Could we pull up Porteous Exhibit 1100(g), please.

Can you tell us what this document is, Professor Pardo?

A This was the Chapter 13 trustee's objection to plan confirmation.

Q In Judge Porteous's case?

A That's correct.

MR. WALSH: Madam Chair, we'd offer 1100(g) at this time.

MR. SCHIFF: No objection, Madam Chair.

CHAIRMAN MC CASKILL: Will be received.

(Porteous Exhibit 1100(g) received.)

BY MR. WALSH:

Q The trustee objected to confirmation. Can you tell us what happened to Judge Porteous's expenses on schedule J after the trustee objected, in terms of dollar amounts?

A They were reduced.

Q And what was the effect of that in terms of payments to the creditors under the plan?

A The effect is that the reduction expenses increased the amount of disposable income, which in turn increased the distribution to general unsecured creditors.

Q When we're talking about projected disposable income, do the debtor's assets on hand on the date of the bankruptcy filing count as projected disposable income, and they have to be paid over to the creditors?

A They do not.

Q Chapter 13 is forward-looking rather than Chapter 7, which is somewhat backward-looking. Is that a rough approximation?

A That's correct.

Q Let's talk about the tax refund we've heard about in these proceedings for the year 2000. In your view, was the 2000 tax refund disposable

income that would be paid over to the creditors in Judge Porteous's case?

A It wasn't. And if you'll just indulge me for a moment to show by way of example why it would not be.

On -- if Judge Porteous had instead filed for Chapter 7, there is no doubt that that 2000 tax refund would have been property of his bankruptcy estate, meaning then that it would have been available for liquidation for the benefit of creditors as an asset. It was a claim -- his tax refund at the time he filed would have been a claim against the IRS for the amounts due in owing, and the trustee would have been entitled to administer that claim for the benefit of creditors.

Had Judge Porteous made any attempt to, say, this tax refund is not part of the estate because it's earnings, and earnings are excluded, future earnings are excluded from the estate in Chapter 7, that argument would not have worked.

And so in Chapter 7, it would have been an asset liquidated. He, in fact, filed for Chapter 13. One of the mandatory requirements of Chapter 13 under 1322(a)(1) is that the debtor devote a portion or all future earnings, whatever may be needed, to

complete the plan.

So debtors, as a matter of law, are required to turn over some portion of their income. Now, one of the things a Chapter 13 debtor may do is liquidate property, but they need not do so.

There can be no requirement to force a debtor to liquidate an asset. And so this 2000 tax refund would not have been part of his disposable income.

Q Okay. Let's -- let's talk about another income issue we've heard about, the committee has heard about also, and that's the FICA withholding limit.

Professor Pardo, is it fair to say that somebody involved in this process probably should have identified this as an issue?

A Absolutely.

Q In your view, is it reasonable to have expected Judge Porteous to appreciate and understand the significance of that issue in a Chapter 13 case?

A No. From my understanding and from what I've reviewed the record, there was never any discussion between his attorney, Mr. Lightfoot, regarding on schedule I, there is a statement at the bottom regarding whether any increases in income are

anticipated. So there was no discussion about that.

And so without that sort of prompting from the attorney, there just -- once the pay stub was given, there would be no reason to continue the conversation absent some more direction from his attorney.

Q Okay. Can we pull up Porteous Exhibit 1108, please. I believe this is already in evidence.

The trustee in Judge Porteous's case became aware of the issue as a result of an interview with the government that we heard about in yesterday's testimony; is that right?

A That's correct.

Q And he concluded that addressing it wouldn't substantially increase the percentage paid to unsecured creditors, and he declined to take further action; is that right?

A That's right. And I think, you know, the significance of this is note that a trustee has financial incentive to some extent to pursue added distributions and added income, insofar as not only is it the trustee's duty to represent the interests of general unsecured creditors, but moreover, if you talk about financial incentives, the trustee --

Chapter 13 trustee's fee is based on a percentage of total distributions made under the plan.

So if he had recovered extra amounts, it would have also inured to his pecuniary benefit.

Q Okay. We heard some testimony yesterday about Judge Porteous's bank accounts after the bankruptcy filing.

A Yes.

Q And in particular, there was a discussion about the fact that Judge Porteous used the Fidelity account after the bankruptcy, even though it wasn't included on his schedule B.

Does the code, Bankruptcy Code, say anything about where a debtor can bank?

A It does not.

Q Was Judge Porteous required to keep his cash after bankruptcy filing only in bank accounts that were listed on schedule B?

A No, he was not.

Q If Judge Porteous had, a week after filing for bankruptcy, closed both the Bank One account and the Fidelity account and opened an account at Bank of America, he could have put all his cash into the Bank of America account; correct?

A That's correct.

Q Do trustees regularly receive and review bank statements from Chapter 13 debtors after their bankruptcy filing?

A To my knowledge, they don't.

Q If Judge Porteous had included the Fidelity bank account on his schedule B and this $283 balance, would that have had any effect on where he kept cash post petition?

A It would not have.

Q There have also been some discussions about the fact that Judge Porteous withdrew funds from his IRA after his bankruptcy filing. Is there anything wrong with that?

A No.

Q Do creditors have any claim to funds that are held in a valid IRA?

A No. Again, the Bankruptcy Code is very clear that once a confirmation order is entered, all property that has not been spoken for in the plan as being distributed vests back in the debtor, free and clear of any creditor claims.

Q And the IRA would have been exempt in the first place?

A That's correct.

Q We've also heard a lot of discussion about

incurring additional debt after the bankruptcy filing.

You've heard some testimony that Mr. Beaulieu, the trustee, gave a pamphlet to the Porteouses at or before the initial meeting of creditors; right?

A Yes.

Q And could we pull up House Exhibit 148, page 4, please. And let's look at the language about incurring debt, see if we can blow that up. There we go.

Does the Bankruptcy Code include any ban on borrowing money or buying anything on credit without permission of the bankruptcy court in Chapter 13?

A It doesn't. And furthermore, if you look at what a plan may provide under 1322(b), it provides that a debtor may provide for a payment to post-petition creditors through the plan, if they receive approval. But that suggests that the option exists to deal with those post-petition creditors outside of the plan.

Q Okay. We've also seen some language from the confirmation order that was entered by Judge Greendyke in this case, and we'll pull up Porteous

Exhibit 1100(p). Can we highlight -- we'll identify that as the confirmation order. Can we pull up the language down there at the bottom. There you go.

Does the Bankruptcy Code include a ban on a debtor's incurring debt without the trustee's approval?

A It does not.

Q Let's talk about the language that we have on screen now in the confirmation order. If you interpret that language literally, what sort of activities might Judge Porteous or his late wife have engaged in that technically would violate that order?

A If we give this, the first sentence of the fourth paragraph of the order, its literal meaning, if Judge Porteous sat down for lunch, had a sandwich, he would have incurred debt.

If Judge Porteous decided he needed an oil change and he took it into the garage, he would incur a debt once the oil had been changed.

Any time Judge Porteous was turning on the lights in his house, he was incurring a debt to his utility company.

Q When we're thinking about these sorts of things that people do every day, is the analysis any

different if someone pays with cash or with a check?

A No. If -- the payment form has nothing to do with whether a debt has been incurred or not.

Q If I were to go to Macy's this afternoon and purchase $200 worth of clothing and give them a personal check, can Macy's turn around tomorrow and sue me?

A No, they can't. And here I think some explanation is required as to why they can't sue you.

So if you pay with a check, a check is a negotiable instrument. And Article III of the Uniform Commercial Code governs negotiable instruments. And UCC Article III has been enacted in Louisiana.

And what it says is that when a check is taken for a payment obligation, the effect of taking the instrument or the check for a payment obligation is to suspend the obligation.

Moreover, and when they -- when you pay Macy's on the check, you make that check payable to Macy's, you are the drawer on the check, and so you will be liable on the check itself, the instrument, based on your obligation as a drawer, only if -- only if and only when -- your bank dishonors that

check.

So if you gave a check to Macy's for clothing and you -- Macy's suddenly decided, you know what, we don't want this check, we're going to turn around and we are going to sue you for the underlying payment obligation, they couldn't do that because it's been suspended under the Uniform Commercial Code.

And if they tried to sue you on the check, they couldn't. They couldn't sue you on the check until they presented it and it was dishonored.

Q Okay. Does the nature of what's being purchased affect the analysis?

A It doesn't. So, for example, let's say you had gone to the grocery store and purchased potato chips with a check. The analysis wouldn't change.

Q All right. Let's look at an example of a marker. Could we pull up House Exhibit 301(b) and look at page 5.

So this is one of the markers that's at issue in this case. Professor Pardo, legally speaking, what is this marker?

A Well, under Louisiana law, a marker is considered to be a check, and a check is defined

under Article III of the Uniform Commercial Code as a negotiable instrument. A negotiable instrument is either a promise to pay or an order to pay.

If it's a promise, it's considered a note, and so therefore, a debt instrument. If it is an order to pay, it is not a debt instrument.

And a check -- and if a negotiable instrument is an order, it is a draft, and a check is a type of draft. It's a draft that is payable on demand and that is drawn on a bank.

And so this is a check which is not a debt instrument, but it's a -- nonetheless a negotiable instrument under the UCC.

Q Does the fact that a casino might agree not to present a marker for a period of time cause it to be something other than a check?

A No, it does not.

Q So I gave you a Macy's hypothetical a minute ago. Let me give you a different hypothetical now.

Let's say I go to a casino and identify myself, they know who I am. I sign a marker for $500, and they push $500 of chips over to me.

Have I incurred a debt?

A Well, any payment obligation that there

might be for those casino chips has been suspended. And so it's been suspended, so at that point, once the check has been taken, there is no debt for which you could be sued at that moment in time.

Q How come the underlying payment obligation that you referred to for me to purchase the chips, how come that's not a debt in violation of the confirmation order in Judge Porteous's case?

A Well, again, if we go back to -- again, we could go back to the view that you have to take a literal interpretation of the confirmation order. And I think taking that literal interpretation would lead to an absurd result.

The idea is that there ought to be some flexibility in the way in which one pays for things.

And so when you end up with a contemporaneous exchange of a check in this case for casino chips, it's no different than all the other examples we've worked through.

Q All right. One of the themes that we've heard in these proceedings and in the House proceedings as well is that Judge Porteous was a federal judge, he supervised bankruptcy judges, he was sophisticated, he should have known better.

So let's talk about that for a moment.

Who appoints federal bankruptcy judges?

A The Federal Circuit court judges.

Q And technically, district judges have original jurisdiction over bankruptcy cases and bankruptcy proceedings; right?

A Well, technically, that's correct. But as a matter of practice, every federal judicial district in the country has a standing order that automatically refers all bankruptcy cases from the district court to the bankruptcy court. And those orders further say that all cases shall be filed in the bankruptcy court.

Q Okay. And can you tell the committee some circumstances where bankruptcy issues might come before a federal district judge?

A Sir, one possibility is that the case that was referred to the bankruptcy court is withdrawn back to the district court. That almost never happens.

Another possibility is bankruptcy judges are only authorized to enter final orders in what are core proceedings. If it's a noncore proceeding, they can only make recommendations, similar to a magistrate judge. So at that point, the district court judge would have to review the findings.

Noncore proceedings are also extremely rare.

Another possibility is district court judges sit as appellate judges in bankruptcy cases, and the first level of appellate review in the bankruptcy system is generally to the district court, unless there's a -- the appeal occurs in a circuit that has a bankruptcy appellate panel.

Q Have you looked into bankruptcy-related cases that came before Judge Porteous and his colleagues in the Eastern District of Louisiana?

A Yes. So I've looked both at the general statistics regarding appeals in Louisiana, as well as Judge Porteous's bankruptcy appellate opinions. I'll start with sort of the broad picture.

Beginning for -- beginning in fiscal year 2007, the administrative office of the United States Court started reporting in statistical tables and its report on the judicial business of the United States the number of bankruptcy appeals filed in each federal judicial district.

If you look anywhere from fiscal year 2007 through 2009, there were, on average, 35 appeals, bankruptcy appeals, filed per year in the Eastern District of Louisiana.

Statutorily, they are currently authorized

12 federal district court judges for the Eastern District of Louisiana. So that averages to basically three bankruptcy appeals per year. So there just isn't a frequency there with which one can become an expert in bankruptcy.

And, you know, Judge Porteous's record, at least what's -- what can be obtained from Westlaw database, which contains published and unpublished opinions, if you do a search for all of his bankruptcy appellate opinions, there were only seven opinions during his entire tenure on the federal bench. Four of those were business cases, and three of those were consumer cases.

Q And did any of those seven cases relate to disclosure issues or incurrence of debt post petition by a debtor?

A They did not.

Q Let's turn to Porteous Exhibit 1067, page 2 in particular. And Professor Pardo, is that an article that you coauthored that was published in the Vanderbilt Law Review?

A Yes, it is.

Q That was published in 2008?

A Yes, it was.

MR. WALSH: We would offer 1067 at this

time, Madam Chair.

CHAIRMAN MC CASKILL: Objection?

MR. SCHIFF: I apologize, Madam Chair, I was discussing a matter with counsel.

MR. WALSH: I'm sorry, we offered 1067.

CHAIRMAN MC CASKILL: And I think this is something -- is this published?

MR. SCHIFF: No objection, Madam Chair, published editorial -- Law Review article.

CHAIRMAN MC CASKILL: That's fine.

(Porteous Exhibit 1067 received.)

BY MR. WALSH:

Q Tell us briefly what you and your coauthor concluded in this article.

A The idea here was to investigate the quality of appellate review and to do so by looking at bankruptcy appeal. As I just mentioned, there are some circuits that have bankruptcy appellate panels, which are three-judge panels of bankruptcy judges who are experts in their field.

And our thought was that you could -- our hypothesis was that the bankruptcy experts will provide a better quality of appellate review than the federal district court judges.

And there's a whole lot of anecdotal

evidence about this. So we sought to test this empirically. And there are two measures we used for quality of appellate review.

One is reversal by the circuit court. Right, if the circuit court says you got the appeal wrong, then that goes to, you know, the decisionmaking and whether it was good or not.

And then the other was citations by other courts to federal bankruptcy appellate -- federal bankruptcy appeals opinions, whether by district courts or bankruptcy appellate panels.

And we found statistically significant evidence that the district court judges get reversed far more often than the bankruptcy appellate panels and, moreover, that the district court judges get cited much, much less than the bankruptcy appellate panels, also suggesting that it's the experts who really know it and the generalist judges don't really get this stuff.

Q All right. When you -- I'm changing gears here. When you interview clients in the King County Debt Clinic, what do you typically observe about the state of their financial records?

A Often their financial records are in complete disarray. There are some times that I feel

that, you know, I'd need some sort of degree in forensic accounting to make sense of what they bring in. Nothing is organized in any coherent manner. There are a lot of gaps.

I thankfully am someone who never suffers from headaches, but the one time I get headaches is every time I come out of the King County Debt Clinic. And it's because it's just incredibly stressful to try and sort of piece together the financial picture based on the records that debtors keep.

Q Let's pull up, if we could, Exhibit 1070, Porteous Exhibit 1070, and page 1 in particular.

Professor Pardo, are we looking at an article published by Judge Rhodes, a bankruptcy judge, published in the American Bankruptcy Law Journal in 1999?

A Yes.

MR. WALSH: We would offer 1070 at this time, Madam Chair.

MR. SCHIFF: No objection, Madam Chair.

CHAIRMAN MC CASKILL: It will be received.

(Porteous Exhibit 1070 received.)

BY MR. WALSH:

Q Tell the committee generally what Judge

Rhodes did in his study that's published here.

A So Judge Rhodes, as a bankruptcy judge for the Eastern District of Michigan, had this sinking suspicion, based on his observations and experience in his courtroom, that there were a lot of problems with disclosures made or disclosures that weren't made in the papers filed by consumer debtors.

And he sought to test his intuition by doing an empirical study of filings in his court.

And he found that in 99 percent of the cases, there was at least one error. The average number of errors in the schedules and the statement of financial affairs for the average case was 3.4 errors, and 26 percent of the cases had more than -- five or more errors.

Q And can we zoom in on the end of the paragraph at the end of the first page there, and can you summarize for us what conclusions Judge Rhodes drew from his study that he performed?

A I mean, three main conclusions, that there is widespread lack of care and understanding as debtors and their attorneys fill out the disclosure, try and comply with the disclosure requirements. The official bankruptcy form don't communicate in any sort of meaningful way what the nature of the

disclosure requirements are.

And last but not least, the requirements are unrealistic and have the unfortunate effect of ensnaring individuals who are engaged in what otherwise would apparently be innocent behavior.

Q Are errors in bankruptcy cases limited to debtors' mistakes?

A Absolutely not.

Q Let's turn to Exhibit 1068, Porteous 1068. Page 1 of that exhibit, please.

Professor Pardo, are we looking at an article published by Professor Katherine Porter in the Texas Law Review in 2008?

A Yes.

MR. WALSH: We would offer 1068, Madam Chair.

MR. SCHIFF: No objection.

CHAIRMAN MC CASKILL: Will be received.

(Porteous Exhibit 1068 received.)

BY MR. WALSH:

Q Tell us, generally speaking, what was Professor Porter investigating in this analysis?

A Professor Porter here wanted to empirically investigate what -- whether mortgagees in bankruptcy were properly documenting their

claims, mortgage claims, against debtors in bankruptcy. And specifically in Chapter 13 bankruptcy.

So she looked at 1700 Chapter 13 cases.

The bankruptcy rules require you, as a creditor, to file a proof of claim. And moreover, that proof of claim generally has to be accompanied with three disclosures. One is an itemization of charges. The second is, if the claim is based on a writing, a copy of that writing, so in the case of the mortgage, the actual note itself.

And if the claim is secured, evidence of the security interest. So in that case it would be the mortgage.

And so she wanted to see are mortgagees complying with these disclosure requirements? Do the proofs of claim have the three required disclosures?

And she found out in slightly more than 52 percent of the cases, at least one of the items was missing.

Q Now, we've heard already in these proceedings that when debtors file their schedules, they have to list the amount that they believe they owe to each creditor; right?

A That's correct.

Q As we've heard a number of times, that's done under penalty of perjury; right?

A That's correct.

Q When a creditor files a proof of claim, is it supposed to list the amount that it believes it's owed by the debtor?

A Absolutely.

Q Is that done subject to the federal statutes governing bankruptcy fraud?

A It is. The creditor could be subjected to criminal prosecution for submitting a fraudulent claim or, moreover, and not as harsh penalty, but by submitting this signed statement, you're also subject to court sanctions if, for whatever reason, the claim is not supported by the evidence.

Q Okay. What did Professor Porter find about the correspondence between these two items? What debtors say they owe and what creditors say they are owed?

A So a debtor would list their mortgage in schedule A -- I'm sorry, in schedule D, the secured claims. And she was comparing the amounts reported by the debtors, compared to what was listed in the proof of claim.

She found that in approximately only 5 percent of the time did the two match up.

And moreover, if -- she found that in those 95 percent of the cases where they didn't match up, in 70 percent of the cases or maybe a little bit more, that the creditor was asking for more than what the debtor had scheduled. And the median amount was something like in excess of $3000 more.

Q So in 95 percent of the cases that she reviewed, is it fair to say somebody was making an inaccurate statement that could be subject to criminal prosecution or court sanctions?

A That's correct.

Q Professor Pardo, are you here to tell the Senate that errors in bankruptcy cases are a good thing?

A I'm not.

Q What's the point of this portion of your testimony?

A I think it's very important for the committee members to realize that, number one, the system wants to encourage complete and accurate and meaningful disclosures, and that nondisclosures are generally not a good thing.

But at the same time, the system has been designed in such a way to recognize that there is a spectrum of conduct regarding nondisclosures, errors and omissions. And Congress has given the courts, as well as participants in the bankruptcy system, those tasked with administering the system, many tools in their toolkit to deal with these sorts of errors and omissions.

I've heard a lot of testimony, including from Judge Keir, that if we don't have perfect bankruptcy filings, if we have errors and omissions, the whole system will grind to a halt.

I contend otherwise. I say that if we focus -- if we take this all-or-nothing approach to what the effect ought to be of an error or omission, that is when the system will grind to a halt.

We can't let, in the bankruptcy system, we can't let perfection be the enemy of the good. And bankruptcy represents -- you know, it's the eleventh hour, financial distress, creditors are going to have losses, and we want to try and ameliorate that situation. And we want to give -- we've given again the participants in the bankruptcy system various tools in their toolkit to address these issues.

MR. WALSH: Thank you, Professor Pardo.

No further questions at this time.

CHAIRMAN MC CASKILL: Cross-examination?

CROSS-EXAMINATION

BY MR. BARON:

Q Good morning, Professor Pardo.

A Good morning.

Q My name is Alan Baron. I'm here as special impeachment counsel for the House of Representatives.

I want to make sure of something you said earlier. You said, I believe, the only basis for denying a discharge in a Chapter 13 proceeding is if you don't complete the plan.

Am I correct?

A That's correct. And I should also -- I should clarify that there is something -- there is a Chapter 13 hardship discharge, where the debtor fails to complete all the payments, and the court might still choose to grant the discharge in that case.

The hardship discharge isn't applicable here. But a hardship discharge could be denied if -- as long -- if, for example, the debtor was responsible for the circumstances that led to the failed plan, and if the plan could not be modified.

So there is another discharge in Chapter 13.

Q Okay. But that's -- let's put that on the side.

A Sure.

Q Subject to that, am I correct that the only basis for denying a discharge in a Chapter 13 proceeding is not completing the plan?

A That is correct.

Q So that if the debtor lies throughout his petition, throughout his schedules, but he does complete the plan, in your view, then, your testimony is discharge should, indeed must, be granted?

A That's correct. And what the creditors would do if -- if the lying and deceit came to light before plan confirmation and -- or even after confirmation but before discharge, they could move to convert or dismiss the case.

And if they learned of it after the discharge, they could seek to revoke the discharge on the basis that the discharge was obtained through fraud.

Q Well, then okay, it sounds like you're modifying it.

A I'm not. Denial -- denial of discharge and revocation of discharge are two completely distinct legal -- and I testified that -- about both concepts.

Q Well, do you understand that the Senate has convened and this proceeding is an impeachment trial, and it's not sitting at some sort of appellate court to decide whether the discharge in a bankruptcy was properly granted? Do you understand this is an impeachment trial as to whether Judge Porteous should continue to hold the office, a lifetime appointment as United States District judge? Do you understand that?

A I understand that this is an impeachment trial, yes.

Q So that a lie that might not prevent a discharge in bankruptcy, would you concede that that might be a relevant factor in an impeachment trial?

A No, I am not ready to concede that. I'm not an expert on impeachment matters.

Q But it wouldn't impede a discharge in bankruptcy subject to the qualifications you gave?

A Right. In the same way that making a knowingly false statement or oath in a Chapter 7 case wouldn't be the basis for denying a discharge.

Q Now, you've testified that a marker doesn't create a form of debt; is that correct?

A That -- you're putting words in my mouth.

Q Then I'm -- I asked you if I was correct. If I'm wrong, correct me.

A It creates a contingent debt.

Q Contingent debt.

A A contingent debt.

Q Okay. When the casino -- a person gets markers by getting a line of credit from a casino, isn't that where it starts? That's the process when it starts?

A I think that that's an inaccuracy to say that there's a line of credit.

Q You can borrow up to a certain amount?

A There's no borrowing.

Q Oh, no borrowing, in your view?

A There's no borrowing.

Q Have you talked to casinos about that?

A What casinos do is they're doing a credit check to decide if they're going to take checks from you, which are not debt instruments, to decide what do we think is our comfortable level of risk here, how many checks do we want to take from the debtor.

In other words, what do we think is the

solvency of the bank account. In the same way that a landlord checks my credit before I take out a lease. My landlord is not giving me a line of credit.

Q So when the casino at the cage -- I've never done this, but I assume there is a cage where they push $1000 worth of chips in the gambler's direction, there's no debt created, no extension of credit has been created. Is that your testimony?

A Well, first of all, I'd begin by saying there's no casino that would ever push $1000 of chips towards you before you paid and gave the money, is my sense, just as a layperson. And from my limited experience in having gone to casinos.

But moreover, so -- and technically, if you want to be technical about it, when you push the marker, at that point you're a creditor of the casino, because they have purportedly agreed to give you value in exchange for the payment --

Q The marker.

A The payment was given. So you are a creditor of the casino until the point that they then give you value back.

Q In your view, the marker is not -- is not a form of credit and it doesn't create a debt.

A I said that it creates a contingent debt, and that contingent debt is the obligation of the drawer, in the event that the check is dishonored. In the event that the check is dishonored.

Q Can we put up Exhibit Number 5, please. I want to be sure I'm accurate in characterizing this. This is the majority report in the Fifth Circuit dealing with the issue of whether a marker is an extension of credit. Is that up on the board? Okay.

Do you see that?

A Yes, I do.

Q Impermissible debts. "Porteous was explicitly warned by the Chapter 13 trustee, S.J. Beaulieu, his own attorney and Judge Greendyke, that he could not incur more debt while in bankruptcy. Examples of incurring debt would include using credit cards, including credit cards not disclosed to the trustee, and taking out gambling markers.

"A gambling marker is a form of credit." Drop down to the footnote.

"A gambling marker is a form of credit extended by a gambling establishment, such as a casino, that enables a customer to borrow money from the casino. The marker acts as the customer's check

or draft to be drawn upon the customer's account at a financial institution, should the customer not repay his or her debt to the casino.

"The marker authorizes the casino to present it to the bank for negotiation and draw upon the customer's bank account any unpaid balance after a fixed period of time.

"Porteous testified that this definition of a marker was accurate."

Do you disagree with what was written in the Fifth Circuit?

A I completely disagree. And I'm not surprised. They're not experts in the Uniform Commercial Code, and it's understandable why they would get it wrong. And I witnessed yesterday a federal bankruptcy judge, when asked whether the taking of a check suspends the underlying payment obligation, he said no, which is an incorrect statement of law, under UCC section 310 b 1. He got it wrong, a bankruptcy judge.

So I'm not surprised that Fifth Circuit judges, generalist judges, are misdescribing what a marker is.

Q Could I have Exhibit 10, please.

Now, I'd represent to you this is Judge

Porteous's, I guess, colloquy with the Fifth Circuit during his hearing there. And the question is coming from one of the judges.

"Would it be fair to state that a marker is a form of credit extended by a gambling establishment, such as a casino, that enables the customer to borrow money from the casino? The marker acts as the customer's check or draft to be drawn upon the customer's account at a financial institution. Should the customer not repay his or her debt to the casino, the marker authorizes the casino to present it to the financial institution or bank for negotiation and draw upon the customer's bank account any unpaid balance after a fixed period of time."

The question is put is that accurate? The answer is coming from Judge Porteous, "I believe that's correct and probably was contained in the complaint or the second complaint. There's a definition contained.

"Question: And you have no quarrel with the definition?

"Answer: No, sir."

So now, Judge Porteous was wrong also?

A He was. And that's what breaks my heart

about this. I think, you know, if you read judge Dennis's dissent on the Fifth Circuit, he seemed troubled that Judge Porteous didn't have any representation here during this process. And --

Q You know he fired two lawyers, sets of lawyers, along the way, so finally it stopped?

A Again, if a bankruptcy judge is getting the UCC wrong, I'm not surprised that Judge Porteous would incorrectly agree to the legal description of what a marker is.

Q Do you disagree with Judge Keir's statement that the bankruptcy system relies on the candor of the debtor?

A I don't disagree with that.

Q You --

A I do not disagree with that.

Q Good. And was it your understanding he was saying that the bankruptcy has to be perfect, the bankruptcy process has to be perfect, otherwise it falls apart? Is that your understanding of what he was saying?

A My understanding was that it was pretty close to that.

Q Are you familiar with the quotation that he gave from Local Loan Company versus Hunt, the

Supreme Court case, back in 1934, essentially -- I'm sure it's become known to everybody.

A Yes. I've quoted it in some of my articles.

Q And it says, "Congress provided relief in bankruptcy for the honest but unfortunate debtor."

Isn't that right?

A Yes, that's a 1933 or 1934 Supreme Court case.

Q Right. Do you think it's outdated?

A I think the way that Judge Keir marshaled that was -- it just jarred me, because that's not a standard anywhere in the Bankruptcy Code.

Q So you --

A Courts are creatures of law and they must follow the law, and no bankruptcy judge could say you are not an honest but unfortunate debtor, therefore you don't get bankruptcy relief. They have to proceed according not to maxims but to the statute.

Q So far you've disagreed with the Supreme Court and the panel in the Fifth Circuit. Let's keep going.

CHAIRMAN MC CASKILL: Could --

THE WITNESS: I don't know that I've

disagreed with the Supreme --

MR. BARON: I withdraw that, sorry.

CHAIRMAN MC CASKILL: I hate to interrupt, and the question was withdrawn so you don't have to worry about giving an answer. We have members that have to be at a business session to work on the START treaty on this panel and members that have to go to judiciary session to vote on various proposals. So they need to be working in their committees beginning at 9:30. So we have to break here. I apologize for interrupting the cross-examination.

We've tried very hard not to interrupt you in the middle of your exams but we're going to have to in this instance.

We will be adjourned now until 11:00 a.m. this morning.

MR. TURLEY: Madam Chair, can I just make one point? I didn't want to interrupt my opposing counsel's cross-examination, but we just wanted for the record to say we do not agree that Judge Porteous fired two attorneys. I allowed Mr. Schiff to make that -- he made the same type of qualification. I just wanted to put that on the record.

CHAIRMAN MC CASKILL: Let me just say here, that's not something you can put on the record.

MR. TURLEY: Mr. Schiff just put a thing in the record like that.

CHAIRMAN MC CASKILL: Well, I think what you have to do, if you believe a question is being asked that's assuming facts not in evidence, you need to object on that basis, and then we can make the record clear that the question included facts that are not in evidence.

But just to stand up after questions are asked and want to put stuff in the record, that's not the appropriate way to put things in the record. And I just don't want this to get out of hand.

I'm not saying either side has been perfect here. I'm just trying to keep control of the process.

MR. TURLEY: We just want the same rules, your Honor -- Mr. Schiff made the same type of correction on the record, and we were following with our own correction. But if you don't want to do that, we won't.

CHAIRMAN MC CASKILL: I should have said it when Congressman Schiff said it. Now it may be a

trend -- I think I kind of slyly made a comment, now that we've argued, let's move on, because I felt Congressman Schiff was a little over the line also.

I'm just saying, let's try to keep within -- this isn't a trial, and I've said many times the rulings will not exactly track the rules of evidence, because we're trying to do a complete record. And we've tried to give both of you a lot of leeway.

It doesn't mean that either side can start standing up and saying let me correct the record, and offer evidence. That's not the way we're going to let it happen.

So just try not to do that in the future. If you believe evidence is coming in through a question that is not in evidence, then you should say so at the time the question is asked and we'll try to make sure the record is corrected in that regard.

MR. SCHIFF: Madam Chair, if I could comment, there's a distinction between the remarks I made which were in a colloquy with the Chair over whether memos should be sought from the Department of Justice and whether there was inconsistency, and an objection that a question is assuming facts not

in evidence.

CHAIRMAN MC CASKILL: You all are going to get plenty of time to argue this case. The record is going to be brimming with information that both sides can use to argue your positions in this case.

I don't think we need to get sloppy, is all I'm saying. So with that, we'll see you at 11:00. Thank you.

(Recess.)

CHAIRMAN MC CASKILL: We were doing so well. We have two glitches. All of the Senators that are on formulations had to go back to the START Committee hearing after we voted. That means they cannot get here.

We have the Congress -- our House team from the House -- I think that was redundant. The impeachment team from the House of Representatives has now left for a series of three votes. Without the people from the START committee, we will not get seven -- from the Foreign Relations Committee that are voting on the START Treaty, we will not get seven.

So I think it will be, rather than everyone sit around and waste your time waiting, I think it's going to be more efficient for us to go

ahead and adjourn now and to come back at 2:15, and then we will work through without a break, except for one Senate vote that is going to occur at -- oh, we're done then. We will not have to break for a Senate vote. Hopefully they won't have to break for House votes. But we will start at 2:15 and go until 6:00. And I hope that does not mean we can't get Mr. Gardner on.

MR. TURLEY: We will try, Senator, we're trying to get our bankruptcy people on. You know, we've made a lot of adjustments to our line of witnesses. And we have people that have to leave town. We have to make decisions as to who is going forward. Mr. Gardner, we've been trying to reach him continually. We probably left him a dozen messages in the last hour, and before that probably two dozen.

We've been working with your counsel to try to locate him. But --

CHAIRMAN MC CASKILL: One moment.

I'm being told that Mr. Gardner flew to D.C. yesterday; is that correct?

MR. TURLEY: Yes, we understood he was in D.C. yesterday. He's not been returning our calls, so we don't know what his schedule has been. We've

been trying to speak with him for about --

CHAIRMAN MC CASKILL: It's my understanding that he has flown back to New Orleans.

MR. TURLEY: I was just told that. My colleague Dan Schwartz has been calling continually to try to speak with him.

CHAIRMAN MC CASKILL: Who has talked to Mr. Gardner? He is telling us that he was let go yesterday and told that they didn't need him until Tuesday, and now he's being told that you all told him to get back on a plane and now he's on his way here again.

MR. TURLEY: That is not my understanding of what occurred and we'll get that all on the record if we have to. My colleague has been trying to find him, locate him.

Originally he was told to be here on Tuesday. He flew here on his own accord, and we suddenly found out he was here. Then the Senate staff asked us, you know, he's here so can you put him on.

He was originally a House witness. And my understanding is that we said okay, we'll accommodate, we'll move Bodenheimer up and Gardner up. That was my understanding of those two

witnesses.

The biggest problem we have, Madam Chair, is that we have bankruptcy witnesses as I've been mentioning for a long time that will be leaving town, these are our experts we need.

CHAIRMAN MC CASKILL: Are you telling me we're going to pay for three plane trips for Mr. Gardner? Is that actually in the realm of possibility at this point?

MR. TURLEY: That's not our doing. We've been trying to reach Mr. Gardner. This is not -- as we've been working with your staff, we've been trying to call Mr. Gardner. And we've been very unsuccessful.

Originally, he was supposed to be here to testify as a House witness. When they released Gardner, it created this confusion. We immediately said --

CHAIRMAN MC CASKILL: How long a witness is Mr. Gardner? How long do you think he's going to be?

MR. TURLEY: I would think that he would probably not be certainly more than an hour on direct. But our -- we're going to lose our bankruptcy experts, and we've made promises to them

that we would get them on as soon as possible.

We also could end up losing our judicial ethics person. We've already made adjustments to our order. And in all fairness, Madam Chair, the House did not make a lot of adjustments to their order, they cancelled witnesses, and fine, that's up to them. And you said you manage your witnesses as you want. And that's fine.

But it also created a great deal of scheduling problems because everything moved and we had flights scheduled, so we've been trying to accommodate it. That was part of our accommodation with both Gardner and Bodenheimer.

But as we've said from the beginning, we have these group of experts that we've made promises to to have them testify and get them out. Some of them are federal judges, some of them are a trustee. So that's the problem with Mr. Gardner.

And what I can represent to you is that the minute the House released Mr. Gardner, we immediately tried to reach him. We have not been successful in reaching Mr. Gardner even to interview him for weeks, so this has been a rather difficult situation.

VICE CHAIRMAN HATCH: Madam Chairperson,

could I? We realize this has been very difficult for you, as well as us.

I wonder sometimes if we couldn't have you advance in writing -- we could do away with an awful lot of delays here if we could just recognize your experts as experts. And I think you can submit in writing to us, so we don't have to go through all that rigmarole from here on in.

And I also believe there are other ways that we could shorten -- I think both sides could be even more effective if we could shorten the time on direct and cross-examination.

I think we should look for ways to do that, without diminishing your case and without taking any -- any rights that you have away. We've taken a lot of time on things that really aren't that pertinent to what we're looking at. And we're not blaming anybody, because you felt you had to do that. But I would think we could recognize their experts and save a little bit of time that way.

And I personally believe they have done the best they can to have Mr. Gardner here.

CHAIRMAN MC CASKILL: And I understand the strategy of wanting to prove up your expert even if the other side concedes they're an expert if you're

dealing with a jury, where you want to reassure the jury that the person who is giving these opinions, that you're sure they're hearing that this is somebody who has a substantial background.

But you're dealing with folks that understand these are experts.

MR. TURLEY: I've -- that's fine with the Defense. Their resumes are in the file. We've not objected to any of their experts.

CHAIRMAN MC CASKILL: And they haven't objected to any of yours.

MR. TURLEY: That's right.

CHAIRMAN MC CASKILL: I think this is one of those things, I think you're right, Senator Hatch, one way we can move it along.

Go ahead.

VICE CHAIRMAN HATCH: I also think you've all been using leading questions, it's totally all right, as far as I'm concerned. And I would think that we could -- we don't need to take all of the ground-laying approaches that have been taken. However, you have to try this matter the way you feel it is best handled.

But you might consider that as well, and then we'll certainly consider being, you know, very

gracious about that.

MR. TURLEY: We have no problem with that at all, Senators. We can -- their resumes are already in the record. We can move them as -- into evidence to meet this, and the other side can, if they agree, approve the experts that we have. We'll use leading questions and try to be expeditious. And we'll try to move our experts through.

CHAIRMAN MC CASKILL: You still have the Gardner problem. When did you tell Mr. Gardner that you wouldn't need him today? When did that happen?

MR. TURLEY: Excuse me, Senator.

What I'm told is -- I didn't do these negotiations since I was here as lead counsel. But what I'm told is that when the -- when Gardner was released as a House witness, we were planning to have him for Tuesday. I believe one -- I believe Mr. Schwartz may have spoken to him and had said, you know, you're scheduled for Tuesday. Mr. Schwartz had been leaving messages, you know, this is my understanding.

But I think there was a conversation yesterday and then we couldn't reach him again because the Senate came and said he's got to go today. So we started to leave messages, saying

you've got to go today, we need to speak with you.

I personally know that my counsel started calling him early this morning leaving messages in front of me to tell him we need to speak with you right away to schedule.

So I don't know what the status is. But we've been having difficulty for weeks to speak with Mr. Gardner. In the past he's declined to speak with us, but we finally spoke to him for some minor scheduling.

CHAIRMAN MC CASKILL: Let me ask Mr. Schwartz a question.

MR. TURLEY: Mr. Schwartz is not here right now.

CHAIRMAN MC CASKILL: He's not?

Mr. Gardner says he talked to Don Schwartz yesterday outside of the room, and Don Schwartz told him he could go home.

MR. TURLEY: My -- we're going to go see if we can pull Mr. Schwartz, it's Dan Schwartz. But my understanding is that Mr. Schwartz has told him that he was scheduled for Tuesday for our side, that is we wanted him on Tuesday because we needed to put our bankruptcy lawyers -- bankruptcy witnesses today.

So we've been trying to, where we can, move witnesses into Tuesday so that we can guarantee our witnesses in bankruptcy can be done. We also wanted frankly to just do all the bankruptcy as much as possible. We have one witness left over.

And that created this confusion. We did not know he was coming here when he appeared, and it created this confusion.

CHAIRMAN MC CASKILL: We did know because I talked about it. We talked about it yesterday.

MR. TURLEY: Yes, we were informed by --

CHAIRMAN MC CASKILL: That he was on his way. You originally said there was an accident, and then our staff began to work on this. And we said we could let --

MR. TURLEY: We didn't say -- we were told there was an accident. We're not being evasive, Senator.

CHAIRMAN MC CASKILL: Okay. Let me just say, here's our problem. He is now back on a plane coming here.

Of course, Mr. Schwartz.

He is now back on a plane, so we flew him up here yesterday, and somebody told him you didn't need him and he went home yesterday afternoon,

somebody told him you didn't need him and he went home.

Now he's flying back up here now, he's going to get here at 2:15, and he says he's on a plane at 8:15 tonight to go back.

So I am very reluctant to authorize three plane tickets for the same witness. So I guess what I would urge you to do is if you can't get to him today, because of the time, I would really see if the two of you could agree to take his deposition and submit it for the record after we adjourn tonight. You'd have an hour, at least, before he'd have to get back if he's flying -- is he flying into National?

MR. SCHWARTZ: Senator, let me just clarify what -- I apologize, I was in the other room.

We -- we had asked him to come here. Then we were told by his attorney, who is now no longer his attorney, apparently, that he had been in an accident. And we understood that he was not going to be able to appear -- not be able to get here until next week.

So I contacted his attorney and said he really -- he doesn't have to come until Tuesday.

CHAIRMAN MC CASKILL: Right.

MR. SCHWARTZ: And she told me, oh, too late, he's already on a plane.

We saw him here yesterday, and I did tell him that we, for scheduling reasons, would prefer to have him on Tuesday.

Then I talked to the staff, and they said, you know, we really want you to squeeze him in so we don't have to pay another plane trip ticket.

So I tried to get back in touch with him. I tried last night. I tried this morning. I called his cell phone. I called his motel room. I contacted his former attorney. And I have had no responses.

That's what happened.

CHAIRMAN MC CASKILL: I don't want to interfere with your case, I really don't. I want you to be able to get your experts on. I understand that they have planes to catch also.

I am very apologetic that we also have another job around this place, and that people are now in committee hearings voting on things like the START Treaty, which I can't tell Senators that they shouldn't be heard on things like the START Treaty. It's obviously a very important thing for our

country.

So I can't help that we don't have enough hours in the day today, especially in light of how long you all are taking with these expert witnesses. I've learned more about 7 versus 13 this morning than I learned in law school, and I'm not sure that compare and contrast between 7 and 13 is as probative as you may think it is.

I'm not being critical of what you're doing. You're trying to be very thorough.

But you all are going to have to make a decision, because I don't think -- I mean, unless we want to get physical with Mr. Gardner, with marshals, he's going to get back on an airplane at 8:15 tonight. And then what you all are saying to me is we're going to fly him up for a third time? Do you think he's going to do that? I have a feeling we aren't going to see him again.

So if you think he's important to your case, I would urge you to find an alternative means to get some of his testimony into the record, like asking one of the House team to sit with you in a deposition, we can find you a court reporter, you could -- you could task one of your lawyers while some of your other lawyers are doing things in the

courtroom, you could go to a different place and take a deposition of Mr. Gardner, and we would be happy to take that in the record.

MR. TURLEY: That's fine with us, your Honor. We had been told earlier we couldn't do depositions without two Senators being present. If we could do depositions, that's what we've asked all along is to be able to do depositions with a lot of these witnesses. So we'd be happy to do that.

CHAIRMAN MC CASKILL: We have to have one Senator present. We'll find you a Senator.

MR. TURLEY: Thank you.

CHAIRMAN MC CASKILL: We'll deploy one Senator to sit in the deposition, especially if you could do it contemporaneously with while we're taking evidence in here.

Who is going to do Mr. Gardner? Who was going to do the direct?

MR. TURLEY: We have to look at our -- what witnesses would be testifying at that time.

MR. SCHWARTZ: It will be one of us.

MR. TURLEY: One of the two of us.

CHAIRMAN MC CASKILL: I assume the House team can come up with somebody for a deposition with Mr. Gardner?

MR. BARON: Mr. Schiff was scheduled to do that.

CHAIRMAN MC CASKILL: You may have to do a tag team here, depending on what's going on. I'm trying to do my best to help you get your evidence in the record.

MR. TURLEY: As we are.

CHAIRMAN MC CASKILL: I don't think it's probably likely Mr. Gardner is going to take a third plane trip.

MR. TURLEY: And we didn't want that to happen.

CHAIRMAN MC CASKILL: I know you didn't. I'm not sure who to blame here. I'm just frustrated.

VICE CHAIRMAN HATCH: Madam Chairman, it seems to me that if he's on his way here and he gets here, you ought to find some way of getting him on, and as short a time period as you can, because I know you would like to have the Senators up here hear what he has to say and what your examination of him will be.

But if not, then the deposition will be a reasonable way of resolving this problem.

MR. TURLEY: Yes, we have no opposition

with deposition. We appreciate the accommodation. And we'll do everything we can to facilitate.

VICE CHAIRMAN HATCH: Does the House have any opposition?

CHAIRMAN MC CASKILL: Do you all have any opposition to trying to -- to depose Mr. Gardner, if we can't figure out a way to get it all in before 6:00?

MR. BARON: I would love to talk to Mr. Schiff since --

CHAIRMAN MC CASKILL: That's fair. Why don't you talk to Mr. Schiff, and then if you would immediately get with staff and they will be able to get hold of me. I have my BlackBerry with me. I can come out of the caucus meeting. We can confer, and I can find Senator Hatch, and Senator Hatch and I can talk about it.

VICE CHAIRMAN HATCH: If I were you, I would find some way of getting him on and disposing of the testimony. And there may be a way that we could shorten the time for the testimony as well by getting a stipulated agreement between the two parties, or just by making a ruling here.

But, you know, I think one way or the other, we ought to do it. If I was in your shoes,

I'd want him to testify before the forum.

CHAIRMAN MC CASKILL: I can sit in a deposition between 6:00 and 7:00. I'm not -- the other members have things they have to do at 6:00, but I'm -- I can -- if you want me to stick around and do a deposition until he has to catch his plane tonight, I'm happy to do that.

MR. TURLEY: Madam Chair, Vice Chair, we would be willing to do all those options.

Senator Hatch, we would be willing to shorten it as well.

We're open for anything. We've made that clear to his attorney. We've made it clear to him. And including if we can get agreement from the House to limit his testimony to, I don't know, 30 minutes or 40 minutes, we'll make it work and move him --

CHAIRMAN MC CASKILL: You can even do a stipulation about what he would testify to and send him home. You know? I mean, you all know what he's going to say; right?

MR. TURLEY: Not entirely, but --

(Laughter.)

MR. SCHWARTZ: We haven't talked to him.

CHAIRMAN MC CASKILL: Even more reason to do a stipulation.

(Laughter.)

VICE CHAIRMAN HATCH: The options are yours. There are a number of ways of handling this. What we're suggesting is you should choose whatever is in your best interest, but you ought to do it today.

MR. TURLEY: Yes.

VICE CHAIRMAN HATCH: One way or the other. If your best interest is to have him appear personally, then accommodate it so that you can. If you can't, then the deposition is a reasonable approach towards resolving this.

MR. TURLEY: I can certainly stipulate to all the things I hoped he'd say.

CHAIRMAN MC CASKILL: You guys have to work that out yourselves.

(Laughter.)

CHAIRMAN MC CASKILL: I would depend on you all to figure that out. And we will reconvene at 2:15.

MR. TURLEY: Okey-dokey.

(Whereupon, at 11:53 a.m., the proceedings were recessed, to be reconvened at 2:15 p.m. this same day.)

AFTERNOON SESSION (2:22 p.m.)

Whereupon,

RAFAEL PARDO

resumed the stand and, having been previously duly sworn, was examined and testified further as follows:

CHAIRMAN MC CASKILL: We're back. I believe we were on cross-examination of Professor Pardo.

You may continue your cross-examination.

MR. BARON: Thank you.

CROSS-EXAMINATION (Continued)

BY MR. BARON:

Q Professor Pardo, good afternoon.

A Good afternoon.

Q Doesn't the statute require that the plan being proposed be proposed in good faith? That's statutory language; is that correct?

A That's correct.

Q I want you to follow along with me as I relate the following, and I have a question at the end of it.

The evidence in the case has shown the following. First, Judge Porteous paid cash to pay off three markers totaling $1500 the day before he

filed for bankruptcy. This was on March 27 that he pays it, at the Treasure Chest Casino. This is never reported on his schedules. This is Exhibit 3012.

Second, he filed his original petition in a false name, Ortous. He also gave a P.O. Box as his street address, and it's agreed this was not by accident, it was intentional, and at the same time he swore under the penalty of perjury that the information on his filing was true and correct.

Third, he filed for a tax refund on his year 2000 tax return a few days before he filed his first bankruptcy petition, and that tax return he claimed $4100 and a little bit more as a tax refund.

This is not listed on his bankruptcy schedules, and he never tells his lawyer about it.

He receives the tax refund a few days after filing his amended bankruptcy petition, and he never discloses that.

And number 5, he submits a year-old pay stub, which is about $175 less per month than his actual current income at the time of the filing. Take all that.

In your view, are these activities, taken together, is that consistent with the good faith

requirement for the proposed plan, in your view?

A Well, the concept of a good-faith proposal of a plan, bankruptcy courts have generally used a totality-of-the-circumstances approach, where they weigh and consider a variety of factors, including the debtor's interests in having filed for bankruptcy, the motivation for having filed for bankruptcy, what return there will be for creditors, things of that nature.

And so once those factors are weighed, then it's up for the court to determine whether or not, considered in the totality, whether or not the plan would have been filed in good faith or not, and if it weren't filed in good faith and plan confirmation were denied, then generally a debtor is entitled to propose an amended plan that would meet or cure that good faith requirement.

Q But isn't it true that the concept of good faith, even in -- even in the bankruptcy context, connotes a certain level of integrity and effort to get things correct when you -- when you propose a plan?

A It's a very interesting question. And Congress, I think, has made it particularly clear since reforming the Bankruptcy Code in 2005, there

is now, as one of the requirements for plan confirmation, not only is there the good faith -- proposing the plan in good faith for plan confirmation, but another requirement for plan confirmation is that the petition was not filed in bad faith.

And so this is a distinction that courts look to before the 2005 amendments, and that was the view that there is a differentiation between the act in filing for bankruptcy and whether that is in good faith, as opposed to what are the terms of the plan itself, and are the terms of the plan in good faith.

And Congress gave statutory form to that distinction in the 2005 amendments.

And so I would have to approach the answer to your question with a little bit more nuance, to basically say those are two distinct concepts.

Q But you're talking about something that's contemporary. I'm going back to 2001.

A And so I'm -- what I'm --

Q Back then --

A Back then courts differentiated, when they said what is the proper scope of the good faith inquiry under 1325(a)(3), the issue regards the terms on which the plan was proposed and what the

plan looks to accomplish.

Q And I want to come back to my question.

A Yes.

Q Based on what -- the various activities that I delineated for you, are you saying you can't answer the question as to whether that would constitute good faith or not?

A Well, I think the difficulty in answering your question is that you're presenting the question to me from a very debtor-oriented point of view, that is what would the court say focusing on the debtor activity.

But another thing that the court has to consider is the interests of all stakeholders in the case. And a bankruptcy court looking at this case might say look at the return that's being given to creditors. And if this plan isn't confirmed, it might not be in the best interests of the creditors as a group, and there might be harms on that end.

So a bankruptcy court has a difficult task in terms of judging these competing considerations, and the bankruptcy court may ultimately say it's actually better to move forward with the plan than not to move forward with the plan.

Q So your answer is you can't really make a

determination, based on what I laid out for you?

A My answer -- I think a faithful and honest answer to your question is they are relevant considerations, what you have raised, but it's -- but --

Q You might want to know more? Is that a fair statement?

A I'm sorry?

Q You might want to know more? Is that the problem?

A No, I think the problem is I'm not -- I'm not a judge, and I am not -- you know, I'm not making the determination as to whether to move forward on good faith or not.

Are you asking me to say if I had been hypothetically a judge, what would I have done in this case?

Q You are an expert on bankruptcy, no question about that.

A That's correct, yes.

Q You've studied the cases and you've worked in the field, the volunteer program you mentioned.

I'm just asking, you know, good judgment by a good lawyer. Are those events consistent with the concept of good faith?

A I think I can now give a clearer answer to your question. I think that most of the considerations you've raised are not relevant to the proposal of the plan in good faith, they're more relevant perhaps to whether the case was filed in good faith and whether that would be a basis for dismissal of the case under 1307(c), which allows a court to dismiss or convert a case for cause. No one ever made that sort of motion in the case.

Q I understand. Let's go back to what you're now saying.

A Yes.

Q I'll reframe my question.

A Yes.

Q Given those factors, in your judgment, if those activities in fact occurred, is that -- are those activities consistent with, I guess, a proposal or filing, a petition -- let's use that word, a petition, being filed in good faith?

A Some of those actions are -- the name certainly might be inconsistent. But often, again, schedules and petitions are allowed to be amended to correct errors. And so --

Q I'm not talking about errors. I'm talking about intentional -- it's not a question of amending

because that begs the question. Someone intentionally committed or performed the acts that I've described. In your view, would that be consistent with a good-faith requirement with regard to the filing of the petition? That's all.

A I think they are relevant considerations for determining whether to dismiss a petition on the basis of bad faith.

Q Okay. Thank you.

Now, there was an order issued by the bankruptcy judge in this case which said that the debtor could not incur additional debt without the written permission of the trustee.

Do you recall that provision?

A I think so, yes.

Q Right. In your view, is it okay for the debtor to ignore a court order if he disagrees with it?

A Is it okay for a debtor to ignore a court order?

Q Yeah. I think that order was wrong, and I'm just not going to obey it.

A I think generally all individuals should try and follow court orders to -- yes, I think a debtor should try and follow a court order.

Q What if the debtor doesn't? Is it an option for a debtor to say I just don't like that order, I'm not going to follow it?

A Well, I think as I testified earlier, that if followed strictly to the letter, the judge, in order to comply with the order, would have had to schedule meetings repeatedly with the trustee to get approval to turn on the lights in his home, to go sit down in a restaurant and --

Q Are you really proposing that seriously? You have to get a conference and written permission to flip the light switch? I mean really?

A This is what you're asking -- you're suggesting to me --

Q I just want to see how far you go on this.

A You're suggesting to me the order has to be followed. You just asked me the question, don't you think --

Q You think that's what the order means?

A Hopefully you can clarify for me your question. Are you asking me whether the debtor has discretion to try and interpret the order and to live up to it as faithfully as he can based on a reasonable interpretation? Is that what you're asking me?

Q Let me move on.

A Okay.

Q Isn't it true that if you can't live with the order, don't agree with the order, you can move to amend it, you can move for reconsideration and indeed you can appeal it, isn't that true, without violating it?

A That's true.

Q There are remedies other than ignoring or violating it. Is that true?

A That's correct.

Q Now, Judge Porteous, the evidence establishes that he took out a new credit card after the order was entered. We're not talking light switches now; we're talking a new credit card.

In your view, would that violate the order?

A Taking out the credit card itself doesn't violate the order.

Q Let's say he uses it.

A Yeah, using it would technically violate the order, yes.

Q Okay. Now, if I understood your testimony earlier, you don't believe that markers, casino markers, you don't believe that they constitute debt

here, and the evidence establishes that in this case Judge Porteous took out, I believe it's 42 markers in various gambling trips totaling thousands of dollars, I don't have the number in front of me, but I believe it was about 30-some-thousand dollars.

Am I correct that in your view, that doesn't violate the order, despite what the 5th Circuit said, we looked at earlier, what Judge Porteous agreed to and what Chief Judge Keir said? You just don't think that they're debt; is that right?

A What I believe is that for the instantaneous moment in which there's an exchange of chips for the marker, there is a debt and then that debt goes away, once the exchange occurs. The same way as paying with cash.

Q Kind of a metaphysical thing, just --

A Yes, it's a metaphysical thing.

Q Okay.

A And I might add I would take the same view if he had been paying with cash for the markers. If he chose not to eat food for that month and to go and use the cash for his food for casino chips, if he paid with cash for an instantaneous moment, there would be a debt and he would violate the order.

Q Speaking of food, let me ask you this. If I understood your testimony, you were saying that if he got thousands of dollars in casino chips and markers, that that's the same, in principle, as buying a bag of potato chips.

A That's correct.

Q I thought that's what you said earlier.

A Yes.

Q Okay. And that another way I understood you put it is that there's no difference in a bankruptcy proceeding if a debtor borrows thousands of dollars from a casino and ordering a sandwich in a restaurant, going with the food metaphor here. Is that your testimony?

A I never said borrows money from a casino. I said purchases chips from a casino.

Q Take that back, to use your term.

A Yes.

Q Gets chips from the casino, signs markers; right?

A Yes.

Q And that in your view is the same as ordering a sandwich in a restaurant?

A As I testified, whether a debt arises is distinct and irrelevant from the payment form that

is used to satisfy the debt.

Q By the way, in your earlier testimony this morning, you were saying you weren't familiar with the whole issue of getting a line of credit. Do you remember that?

A I didn't say that I was unfamiliar.

Q I'm sorry. What is your understanding that in order to be able to take -- sign for markers, that you have to apply for credit and get a line of credit?

A Well, that it is basically a credit check, in terms of what risk the casino wants to assume, if it chooses to accept a check instead of cash for casino chips.

Q Okay. Could we put up Exhibit 149, please. And can you blow up the very fine print there.

I'm not sure I can read this, it's very tiny in actual print. This is -- right above the signature line, do you see that? Do you see that sort of fine print?

A Yes, the one that's blown up on the screen?

Q Yes, please.

A Yes.

Q Do you see -- let's take the last sentence of that. It says, "I agree that this application and all credit issued pursuant thereto will be governed, construed and interpreted pursuant to the laws of the state of Louisiana and venue shall lie solely in that state."

Do you see that?

A I do see that.

Q But it's clear the casino believes they are issuing credit pursuant to this and that's where you get the markers. Isn't that right?

A Well, you can call a duck a dog, but if it looks -- you can call a duck a dog, but if it looks like a duck, it walks like a duck and it quacks like a duck, it's a duck.

Q If they call it credit and they're giving you chips and you're signing markers, that quacks like credit to me.

A As a legal matter, I have expressed a view, and I stand by that view, that there wasn't credit extension going on here.

Q Okay.

A And if I might add to that, I might differentiate if instead of markers which were checks, if instead what had been executed was, let's

say, a promissory note in exchange for the chips, that would have been a debt instrument. And that I would have considered to be the incurrence of debt.

But the payment with check, which is an order and a draft, is not a debt instrument.

Q If I understand what you're saying, that a bankruptcy trustee should have no more concern about the debtor getting those casino chips and signing markers than ordering a tuna sandwich, that they're basically equivalent in your mind, neither one is credit, is an extension of credit.

Am I right? And I don't want to misinterpret you. I'm really asking you.

A I am saying -- and I think you're correct to point out that there is a metaphysical moment, whether you're paying by cash or check, when services have been provided to you or goods have been provided to you that you actually do incur a debt.

And so Judge Porteous, by the technical letter of the order, as I said before, if he's turning on the lights, he's violating the order.

And so I adhere to the view of what I've stated before, that for a metaphysical moment, there's a debt. But when you pay with a check, in

essence, it's like paying with cash.

Q Now, you said at the outset when I began cross-examination, you said that -- and indeed you said it in your direct, that the only thing that is a basis for denying a discharge under a Chapter 12 is the failure to complete the plan. Is that accurate?

A In Chapter 13.

Q I'm sorry, did I -- Chapter 13.

A Yes. And if you exclude the hardship discharge, which we are not going to talk of.

Q Do you really think that Congress intended that filing under a false name, using a false -- filing false schedules under penalty of perjury, are matters that simply don't have any consequence in the bankruptcy context?

A As I testified, I said that Congress gave the bankruptcy courts many tools in their tool kit to address these issues. But I know for a fact, if I read, for example, 727, I believe it's A(6) that relates to denying a discharge in Chapter 7 for making a knowingly and fraudulently false oath, Congress there signaled that if you knowingly make a false oath or account but it's not fraudulent, you can't be denied a discharge.

That doesn't mean you infer there are no consequences. It just means in terms of granting the biggest relief bankruptcy has to offer, those things aren't considerations to be taken into account if they're not fraudulent.

MR. BARON: Thank you, Madam Chair.

CHAIRMAN MC CASKILL: Redirect?

REDIRECT EXAMINATION

BY MR. WALSH:

Q Good afternoon, Professor Pardo. I have a few questions on redirect.

I want to make sure that everybody heard and understood something that came up in the first segment of your cross-examination and then right at the end again also.

You mentioned that a knowing false statement is not a basis for denial of the discharge in a Chapter 7 case; is that correct?

A That is correct.

Q What about a knowing and fraudulent false statement?

A That is a basis for denial of discharge in Chapter 7.

Q Okay. And you also talked in both segments of your cross-examination about whether a

false statement is a basis for denying a discharge in a Chapter 13 case. Are you suggesting that a debtor that makes a false statement is excused from satisfying the statutory requirements for confirmation of a plan?

A I am not saying that.

Q And if a plan is never confirmed, does a discharge issue?

A No, it does not.

Q Are you saying that nothing else could happen to a debtor who makes a false statement, no other adverse consequences could result from that?

A I'm not saying that. It's within the inherent authority of the court to sanction the debtor for improper behavior.

Q Okay. When you and I at the beginning of your testimony talked about the differences between discharges in Chapter 7 and discharges in Chapter 13, what was the point of that discussion?

A Again, it's to emphasize that Congress has made the distinct and discrete policy choice that there's a wide spectrum of behavior regarding disclosures and the reasons for errors or omissions or nondisclosures, and that there ought to be a variety of different consequences.

And in terms of granting the main form of relief that bankruptcy law offers to debtors, it's only in Chapter 7, if you make a false statement or oath or account in your case, you will be denied a discharge only if it was not only knowing but fraudulent.

And in Chapter 13, it's not a basis for denial of discharge at all. Again, that's not to say that there aren't consequences. But the idea is that the bankruptcy system is not predicated on a notion of strict liability regarding bankruptcy outcomes when there are errors or omissions or nondisclosures in bankruptcy cases.

Q Okay. You talked with Mr. Baron a little bit about the 5th Circuit opinion that led to these proceedings that bring us here today.

I take it from your testimony you disagree with the analysis of the majority of the 5th Circuit judicial council?

A Yes, I do.

Q There was a dissent that's already in evidence that was signed onto by four judges who participated in those proceedings; correct?

A That's correct.

Q Is it fair to say that reasonable people

can disagree and, in fact, already have disagreed, about whether a marker is a form of debt or a form of credit?

A Yes.

Q And you talked with Mr. Baron about Supreme Court's decision in the Local Loan Company case. Do you recall that discussion?

A Yes, I do.

Q What was the governing bankruptcy law in 1934 when that case was decided?

A It was the Bankruptcy Act of 1898.

Q Is that statute still in effect?

A No, it was repealed in 1978 by the bankruptcy code.

Q Was the Local Loan case a repayment plan similar to today's Chapter 13, or was it a straight liquidation similar to today's Chapter 7?

A If I recall correctly, I believe it was a straight liquidation.

Q And do you agree or disagree with the general principle that bankruptcy is designed for honest but unfortunate debtors?

A I think that basic precept underlies our notion of granting relief to bankruptcy debtors, but it's articulated in very specific ways throughout

the bankruptcy code as a matter of statutory command, rather than some general principle floating out there for courts to implement.

Q Okay. And with respect to one of the last questions you had in your cross-examination, are you here to testify that it's a good idea for debtors to use their limited incomes to gamble?

A No, I'm not.

MR. WALSH: Thank you. Nothing further.

SENATOR RISCH: Madam Chairman.

CHAIRMAN MC CASKILL: I assume we have nothing else from the panel -- from the House Managers or the Defense?

The panel? Questions?

Senator Risch.

SENATOR RISCH: Thank you.

EXAMINATION

BY SENATOR RISCH:

Q Mr. Pardo, I'm truly impressed with your detailed knowledge of the bankruptcy law, and I've got to tell you, I learned some things here. And I gathered from what you'd told us that a way around this very difficult proposition of making a transfer in anticipation is simply to have your secretary make the payment the day before you file, and that

way it is not -- it doesn't fall in the category. Am I right on that?

A On the face of the statute, that's absolutely correct, it does not fall.

Q So if I wanted to pay the creditors that I preferred, making them preferential transfers, I suppose, I would sit down the day before I filed, and I'd list them and I'd hand it to my secretary and say pay my brother-in-law and pay my neighbor and pay these, and then no one would have to worry that they would be set aside as a preferential transfer.

Is that your testimony to this -- to this group?

A I'm not sure that I follow the last part of what you asked me, in terms of what I'm testifying to to the panel.

Q Well, did I understand your testimony that it's not a preferential payment if it was made by your secretary as opposed to by you when you file bankruptcy?

A My testimony was that if the transfer was not in interest of the debtor and property, it would not constitute a preferential payment. If somehow it could be shown that what was transferred was

actually property of the debtor and there was just a mere conduit, then that's a different matter.

Q Well, what happened here? You looked at the facts here. You saw what happened.

A I do not know enough about the facts in terms of the background, in terms of where the money came from. All I know is that the payment from Judge Porteous's secretary came from her bank account. I don't know about any of the acts preceding that, in terms of -- I presume that it came from her own bank account so it was her own money.

Q Okay. So that's how you can avoid a preferential transfer, is simply have the secretary make payments out of her own money?

A The first thing I have to point out is that for any payments that are less than $600, even if they are interest of the debtor and property, they're not --

Q This one was about 11, 1200, as I recall.

A Okay.

Q Doesn't fall in that category.

A All I merely want to point out is that debtors in bankruptcy often do make preferential payments to creditors, and they do so to avoid

consequences like losing the house or something of the like.

Q Okay. Let me get right to it. Is it your opinion that the payment that was made here was or was not a preferential transfer? Or don't you know?

A If the money in the secretary's account was her money and it was not the judge's money, then it is not a transfer of interest of the debtor and property, and so it is not a preference.

Q Do you know what happened here or can we just disregard your testimony if you don't know what happened here?

A My understanding is that subsequent to -- I'm not -- I'm not sure that I follow your question, the terms.

Q You gave all this testimony about this transfer. And I gathered you were trying to convince us that it wasn't a preferential transfer. Was I mistaken on that? Were you trying to convince me it was or was not a preferential transfer?

A I'm happy to follow through on this analysis if you'd like to give me more facts about -- from what I know, I'm telling you from what I know, if it was the property of the secretary, it is not a preferential transfer.

Q So was it or was it not in this case? Or don't you know?

A I am assuming that it wasn't a preference because the money came from the secretary's bank account.

Q Okay. So then the secretary should have been listed as a -- as a creditor. Am I right?

A That's correct.

Q But was not?

A That's correct.

Q And you find no fault with that?

A No, there should have been a disclosure.

Q Tax refund. You went through this lengthy explanation for us that the tax refund coming was not part of the estate, and I got that, okay.

A Yes.

Q But he said under oath that he had no tax refund coming. You got that; right?

A That's correct.

Q Okay. A falsification in the petition is justified because it's not included in the estate? Is that what you're here to testify to?

A No. I said that it's with the inherent power of the court to sanction the debtor for a false oath or account.

Q You agree with us after analyzing everything here that this was a false statement that was made on a petition; is that correct?

A Tech -- yes.

Q Don't give me the "technically."

A This is what I -- I would like to elaborate a little bit on this. I think that -- I think that judge -- Federal District Judge Means from the Northern District of Texas put it best, he had an opinion where he analyzed the Chapter 13 disclosure requirements for debtors.

And he made three very important points. The first, he said, was of course there is the rule that ignorance of the law is not an excuse. He went on to say that notwithstanding that rule, that rule is not absolute, and the Supreme Court has refused to apply that rule with respect to highly technical statutes which have the potential to entrap individuals who are engaged in what's apparently otherwise innocent conduct.

And the third point that he made was the bankruptcy code is a highly technical statute, and its comprehension requires specialized expertise that's beyond the capacity of lay people and, frankly, most, as well, competent lawyers.

And so I think, again, these issues aren't viewed as a black or white question; there are a variety of considerations that have to be taken into account.

Q That has no application here. He checked a box that said he had no income tax refund coming. Isn't that a false and fraudulent act?

A Well, I'm not an expert on what constitutes perjury and what excuses there might be for perjury and how perjury might be cured or remedied, so I'm not an expert to testify in those matters.

Q I'm not familiar with the concept or legal proposition of curing perjury. Is that possible?

A I have no idea, I'm not an expert.

Q All right. Well, let me ask you about this. You did this analysis of how many bankruptcy cases that Judge Porteous had handled. And I guess your conclusion is simply he only had seven bankruptcy cases all the time he was on the bench and therefore was no expert on bankruptcy. Is that what I was supposed to get out of your testimony?

A Yes, that's correct.

Q Okay. Having said that, he should know that when he's asked a question on a petition for

bankruptcy that he's filing under oath, and stating that he's filing under oath, that he can't lie in it, regardless of whether he only handled seven bankruptcy cases.

Isn't that true?

A I wouldn't disagree with that.

Q Okay. Do you find any fault with anything he did here with this bankruptcy proceeding?

A Yes.

Q Are you shocked by the fact that a United States district judge would provide a false and fictitious name under penalties of perjury in filing a personal bankruptcy?

A The identity of the debtor doesn't matter to me. That would be a shocking -- it would be shocking whether it was a regular individual or a public figure.

SENATOR RISCH: That's all the questions I have. Thank you, Madam Chair.

CHAIRMAN MC CASKILL: Any other members of the panel have a question?

EXAMINATION

BY CHAIRMAN MC CASKILL:

Q I just briefly want to -- you've referenced what Congress intended or wanted to do,

and you've got a unique opportunity here. You get a two for.

And I want to make sure I understand from your expert opinion your analysis of gambling and bankruptcy.

These are not foreign concepts to one another, I think you would agree with that; correct?

A I agree with that.

Q In fact, there are untold thousands of bankruptcies in this country every month because of gambling?

A That's right.

Q So your testimony seemed to say that Congress has failed to make it clear that gambling activity must be disclosed on a petition for bankruptcy; is that correct?

A That's not my testimony.

Q Okay. Well, that's what I got from it. So does gambling activity have to be disclosed on a petition for bankruptcy?

A Any debt that is incurred and that is owed at the time of filing for bankruptcy must be disclosed, and so it's my view under my testimony that there was a contingent debt for any, for example, outstanding marker that hadn't been

honored, there was a contingent debt, and that debt would actually be the debt that would be owed to the casino if the marker were dishonored, so that should have been disclosed in the schedule F as marker and then the contingent box should have been checked.

But at the same time, I would also point out that when a check is outstanding, not only do you have a contingent debt, you actually have a contingent claim against your payer bank. That is because if the payer bank wrongfully dishonors the check, you have a claim against the bank for --

Q I'm not worried about a claim of the debtor against the bank. What I'm worried about is the public policy behind the notion that as intertwined, as gambling and bankruptcy are, by the nature of the activities --

A Yes.

Q -- that we somehow -- we've got an expert sitting in front of a bunch of United States Senators saying that we have failed in the law to in some way say that it's important to honestly disclose gambling in a bankruptcy petition? Is that what you're -- is that what basically your conclusion is?

A No.

Q That we have failed to do that?

A No.

Q Well, clearly, Judge Porteous -- in no place in this petition, in no place in this plan is there any hint that there's any gambling activity going on.

But yet you have testified repeatedly that it's like buying a tuna sandwich.

So I think you need to, if you can, clarify for us now, if he failed in some way to meet the public policy obligation of disclosing gambling activity on his petition and his plan in bankruptcy.

A He failed to disclose certain debts that were due, and one of those -- or including a contingent debt, and that should have been disclosed.

My testimony was merely to highlight that the choice Congress has made is that we will not withhold a discharge if -- discharge of your debts if you have made a knowingly false oath or account.

Q Is it common that gamblers hide gambling on their bankruptcy petitions?

A I'm not sure about that. I have no -- I haven't studied that.

Q How many bankruptcy petitions have you

handled of gamblers?

A I have had no gamblers -- contact with --

Q In your clinic work, you've never -- your pro bono work, you've never had a gambler?

A I've never had a gambler.

Q Well, I'm flummoxed by your testimony, because in your zeal to equate buying a tuna sandwich with signing a marker at a casino, it seems to indicate that you are blessing the notion that a gambler could come into bankruptcy and never tell anybody that they're a gambler.

And clearly, that's very relevant, wouldn't you agree, to the bankruptcy court?

A Madam Chair, I don't want you to misinterpret my testimony. My testimony was never that he should not have -- my testimony is that he should have disclosed the debt, it was a contingent debt.

I was merely -- I was merely looking to point out in my testimony about the effect of buying the chips and with the marker to show that there wouldn't have been a preference.

There have been allegations by the House that the Treasure Chest markers involved the payment of a debt, that would have been a preference.

That's a big aspect of their report. And I just wanted to emphasize that technically -- that legally that's not true.

So I don't want -- I don't want the committee to confuse --

Q I understand, I understand. I think a lot of your testimony was very technical about, you know -- and what I'm trying to get a sense of is backing the truck up a little bit.

A Yes.

Q And seeing if, in fact, the duck is quacking.

And I think Senator Shaheen as a question.

EXAMINATION

BY SENATOR SHAHEEN:

Q Mr. Pardo, I think I heard you testify to research earlier that you had seen that suggested that 95 percent of statements that were reviewed showed errors.

Did I understand that correctly?

A It was -- so in the Judge Rhodes study, the study of consumer bankruptcy disclosures, it was 99 percent.

Q 99 percent. And can you tell me how many of those errors involved the action of someone

misstating their name deliberately?

A None of those errors related to an incorrect name.

SENATOR SHAHEEN: Thank you.

CHAIRMAN MC CASKILL: Any other questions? The witness is excused.

Thank you very much for your appearance.

THE WITNESS: Thank you.

CHAIRMAN MC CASKILL: Next witness.

MR. TURLEY: The Defense calls S.J. Beaulieu, bankruptcy trustee.

Your indulgence, Madam Chair. We're looking for him right now. He's just outside the door supposedly.

Whereupon,

S.J. BEAULIEU

was called as a witness and, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. AURZADA:

Q Good afternoon, Mr. Beaulieu.

A Good afternoon.

Q My name is Keith Aurzada, representing Judge Porteous in this matter.

Are you the standing Chapter 13 trustee in

the Eastern District of Louisiana?

A Yes, I am.

Q How long have you held that position?

A Near on 23 years.

Q How many cases have you presided over, would you estimate?

A About 40,000, I would think.

Q In 2001, did you become aware that Judge Porteous had filed Chapter 13?

A Yes, I did.

Q How did you become aware of that?

A I got a call and said they had filed, I think Mr. Lightfoot had called and said he had filed a case and it was originally -- he filed it with a typographical error and that they had to correct the typographical error. I did not know about it until that time.

Q What was the error?

A He spelled the last name as Ortous, the P was left out.

Q So the name on the petition was incorrect?

A That's correct.

Q Did you handle Judge Porteous's Chapter 13 case as you would any other case?

A Yes, I did.

Q Did you do any him any favors because he was a federal district judge?

A No favors. The only favor, I guess, is that his hearing was set in the morning time. I called it to order. There was no creditors present, so I continued it to that afternoon in order that he didn't have to be in front of some of his peers.

Q Then you conducted the meeting that afternoon?

A Yes, I did.

Q Judge Porteous paid over $52,000 to his general unsecured creditors; is that right?

A That is correct.

Q And he made all of his plan payments?

A That's correct.

Q Let's talk about the plan. The original plan that he proposed you objected to; is that right?

A That's correct.

Q And you objected because that plan didn't provide sufficient payment to unsecured creditors?

A That is correct.

Q Okay. And what was the result of that objection?

A We had a hearing. They appointed a judge

in Texas, Judge Greendyke. We had a telephonic confirmation hearing, and the judge overruled one of my objections and he saw fit to allow the other objections to go forward. That increased the monthly payments from 800 something dollars to almost $1600 a month.

Q The plan called for three years of payments?

A That's correct.

Q Did you receive a visit from the FBI in 2004?

A Yes, I did.

Q Was that before or after the plan was completed?

A It was at the end of the plan. I can't tell you for sure the 36th payment had been made or not. But the final account was filed sometime in April of 2004. So it was right at the end because we usually do a final review of the case to determine if we missed anything.

Q So the plan was open and no discharge had been granted; is that right?

A That's correct.

Q After visiting with the FBI, what information did they give you?

A They indicated to me that I had apparently looked at an older proof of income, and there was a difference of $130, I believe, that because of the tax bracket that the judge was in, that I -- at the end of the fiscal year, he would not be charged for FICA, he had over the total, of which I have a very limited number of cases that reach that plateau, and that he had some alleged charge card violation -- use after the filing of the petition and had some gambling -- alleged gambling markers in various Mississippi casinos.

Q As a result of that meeting, did you have one of your staff attorneys write a letter?

A I -- I most certainly did.

Q Can we pull up Porteous Exhibit 1108.

And is that a copy of that letter?

A I have the -- I have a copy of that exhibit in my pocket.

Q Let's --

A I have read that, and yes, it is.

Q And as part of that -- Madam Chair, I believe 1108 is part of the record. But if it is not, I would request that it be made part of the record.

CHAIRMAN MC CASKILL: It is. It's part of

the record.

BY MR. AURZADA:

Q As part of that letter at the end of the last paragraph, you're writing now to the Federal Bureau of Investigation, you said, "you may file an objection to the trustee's final account or you may provide Mr. Beaulieu with evidence of wrongdoing, and the same will be investigated."

Was your offer accepted and did -- was there any response to any objection filed in the case?

A No, no response.

Q For that matter, did any creditors object to any part of the plan?

A There was no objection filed either before confirmation or at any time after confirmation.

Q And when I asked you about the plan payments, is it your position -- well, does the Chapter 13 trustee have a fair bit of discretion in terms of determining what the plan payment should be?

A You look at it and determine to the best of our ability if all the disposable income has been listed, and we look at the expenses to see if they are reasonable for the family size. And based upon

that, we make our determination. Each trustee has their own figures that they use for normal living expenses. Mine are a little stringent.

One of my objections was to -- that got overruled on was to college tuition, which I believe is -- should not have been paid. But Judge Greendyke allowed it in his district.

Q Let me ask you about the actual notice that went out in this case. In reviewing your file, is it your understanding that notice to creditors in this case actually went out using the correct name and Social Security numbers of both debtors?

A That is correct.

Q Okay. In your experience, do Chapter 13 debtors sometimes make errors on their petitions, both in terms of disclosure and the assets that are listed?

A Yes.

Q Judge Porteous's bankruptcy had some problems in it, didn't it, in terms of disclosure?

A After the fact, yes.

Q You learned about them after the fact; right?

A Yeah.

Q Okay. And that included payments of

preferences?

A Yes.

Q An undisclosed tax refund?

A Yes.

Q And the understatement of income, which I think you've already testified about.

A That's right.

Q Now, I really want to ask you, had you known about that at the time, what action would you have taken?

A Just those three things?

Q I think I said them all.

A We talked about the misspelling also.

Q Yes, I'm sorry. Thank you. This, along with the misspelling.

A If I knew for a fact that it was, as I found out later, that it was done intentionally, I would petition the court to dismiss, stating why my motion would dismiss, and give it -- leave it to the discretion of the judge and the U.S. trustee to follow up on it if they see -- if they saw fit.

Q Okay.

A Now --

Q So your testimony is that that's not a decision you would have made as the trustee; you

would have filed a motion and put it before the court and let the court make the determination as to whether there was good faith?

A That's correct.

MR. AURZADA: Madam Chair, may I have one moment?

BY MR. AURZADA:

Q My co-counsel has pointed out one question I failed to ask. Have you had other cases filed with incorrect names in your district?

A A small number.

Q How often does that happen?

A Very seldom. But it's usually not caught until after the 341 meeting.

Q And in this case, when was it caught?

A Before the 341 -- before the notice went out.

Q Thank you, Mr. Beaulieu.

I'm sorry, go ahead, please complete your answer.

A Did you want me to answer the other three portions about the tax returns?

Q Please do.

A Okay. Tax returns, if I would have seen a $4000 tax return, I would have -- that would have

raised a question as to more disposable income on a monthly basis, especially $4000.

The preference, the ones that they showed were inconsequential as far as I was concerned and they were not an insider. So I would not have probably done anything on those two items, except for the tax return. I would have looked at the taxes a little bit closer.

MR. AURZADA: Thank you, Mr. Beaulieu.

CHAIRMAN MC CASKILL: Cross-examination?

CROSS-EXAMINATION

BY MR. BARON:

Q Good afternoon, Mr. Beaulieu.

A Good afternoon.

Q My name is Alan Baron, special impeachment counsel for the House of Representatives.

Mr. Beaulieu, in your direct testimony, you used two descriptions of the way Judge Porteous filed his initial petition. We can agree, everybody knows, it was filed in the name of G.T. Ortous, O-r-t-o-u-s.

A I believe that's correct.

Q First you said somebody called you up to say it was a typographical error. Who was that?

A I believe it was Mr. Lightfoot, and he had

already filed his motion to correct it.

Q Okay.

A I would not have known about it until I looked at the hearing -- at the petition, which is sometime after the 341 meeting notice is sent.

Q And another word you used to refer to G.T. Ortous as a misspelling, I think you pronounced it "Orteous." But there's no E in there, no P and no E.

A I'm not an English major.

Q But the evidence is absolutely crystal clear, undisputed, it wasn't a typographical error, and it wasn't an accidental misspelling; it was collusion between Mr. Lightfoot and the judge to hide his name.

MR. AURZADA: Madam Chair, I object to this question. It's very conclusory. We're at a factfinding mission here.

CHAIRMAN MC CASKILL: Rephrase the question.

BY MR. BARON:

Q There was nothing accidental, it wasn't a misstrike on a typewriter, and it wasn't a misspelling in an effort to spell the name properly. That is beyond dispute.

Does that change your attitude about how -- the effect of filing that initial petition as to whether it was done in good faith?

MR. AURZADA: Madam Chair, I raise the same objection. I'm not trying to interrupt the hearing.

CHAIRMAN MC CASKILL: Overruled.

MR. BARON: Thank you.

THE WITNESS: As I indicated, if I thought it was anything other than a misspelling or typographical error, I would have filed a motion to dismiss for bad faith.

Mr. Lightfoot has been a practitioner before me for quite some time, and I had no reason to doubt that it was, based upon his motion, a misspelling of the name.

BY MR. BARON:

Q Mr. Beaulieu, you've handled, I think you said, over your career about 40,000 cases, Chapter 13s?

A Approximately 2000 a year for the last 20 years.

Q Okay. At the time in 2001, when Judge Porteous's petition was filed, about how many did you have active, under your jurisdiction?

A About 6500 cases.

Q Okay. And how many people did you have in your office, then, to handle the workload?

A 14.

Q Okay. And is it fair to say that you can't check out, and even your people can't check out, every item that's entered on a schedule, let's say, and try to find out what might not be entered on the schedule that should have been there? You can't tell that?

A No, sir.

Q Right. So is it fair to say that you have to depend on the candor, the honesty of the debtor, who submits a petition or a plan, you're really relying on that, are you not?

A Without that, sir, Chapter 13 or Chapter 7 do not work.

Q Would not work?

A Wouldn't work, without that honesty, yes.

Q Right. There's an old Supreme Court case I want to bring to your attention, you may be familiar with it. It says the Congress provided the relief in bankruptcy for the honest but unfortunate individual.

Are you familiar with that

characterization?

A I believe that to be true. I'm not familiar with the case.

Q You mentioned, by the way, and this -- maybe you just forgot. Do you recall you were shown the April 1, 2004 letter from the FBI to you?

A Yes.

Q And I believe your testimony was you didn't get any -- any response -- you said you didn't get a response from the FBI. But did you get a response at all?

A Not that I remember, no.

Q Okay. Can we put that up? This is 299. Do you see that?

A No.

Q There we go.

A I do not remember that, no.

Q But it -- now that you see it --

A Yes.

Q And the second paragraph says, "as we previously discussed, we cannot comment on the existence or nature of an ongoing investigation or share any evidence that may have been gathered in the course of such an investigation. In Mr. Adoue's letter, he identifies several subjects about which

it might be possible for you to make inquiries or take other investigative steps.

"As we stated previously, we take no position as to whether you should pursue any investigation in any case before you. It's entirely at your discretion whether you choose to do so. Please feel free to contact us," et cetera. And it's signed by attorneys in the public integrity section.

Does that refresh your recollection about that?

A Somewhat, sir. It's been a long time.

Q Okay. Mr. Beaulieu, would you agree that Chapter 13 debtors are not allowed to use credit or obtain new credit without the approval of the trustee?

A That's what the confirmation order says and that's what I believe also. It's also stated in my brochure that I hand out to the debtors.

Q Right. There is a brochure that specifically says that, and every debtor who comes before you either gets it handed to him or mailed to him; isn't that right?

A That's correct.

Q That was the way your practice was back in

2001?

A It's been like that for at least 20 years.

Q Okay. And isn't it true, it's your position that debtors are not allowed to use credit cards without the approval of the trustee and they're not allowed to obtain new credit cards without the approval of the trustee?

Isn't that true?

A To create any type of debt after the filing of the petition.

Q Right. Do you recall telling -- do you recall being interviewed by the FBI at any point, back January 22, '04? I don't blame you if you don't remember. But January 22, '04?

A Again, it was two, maybe three occasions.

Q Do you recall saying "if an attorney and debtor filed a bankruptcy application with a false name and the attorney and debtor filing the petition knew the name was false, they should be prosecuted. Schedules filed by debtors should be accurate and any questions should be answered truthfully," and you said you look at "the total of the circumstances surrounding a bankruptcy petition."

A That's correct.

Q Do you recall words to that effect?

A That's correct.

Q Okay.

A My prosecution would be motion to dismiss.

Q Was it your position and is it your position that if the Porteouses receive any tax refunds, particularly that they had applied for just a few days before the petition and they got just a few days -- received it actually a few days after they filed the amended petition, should that have been disclosed to you?

A Yes.

Q Was it disclosed in Judge Porteous's filings?

A Not to my knowledge.

Q Do you recall that the pay stub that was submitted was an old one, it was like from the prior year, because the filing was in 2001? Do you recall that?

A May of 2000, I believe it was.

Q Right. And it was not a huge amount of money, but it didn't -- the filing didn't reflect an increase in pay of about 175 or so dollars a month. Do you recall that?

A After the FBI brought it to my attention, yes.

Q Right. And typically, isn't it true that the debtor should file the most current pay stub?

A That's correct.

Q Now, the evidence has shown that on the day before filing the original petition in bankruptcy, Chapter 13 petition, that was on March 28, 2001, well, March 27, Judge Porteous, and this is undisputed, Judge Porteous paid off three markers, $500 apiece, to the Treasure Chest in cash.

Should that have been reported on his schedules when he filed them?

A I believe there's a question in there that says anything over $500 within the last two years or 90 days, they have changed it up since 2001. So it's somewhere in 90 days or two years prior -- I mean 90 days prior, 60 days or 90 days prior.

Q Right.

A Anything over $500.

Q This was the day before. Three markers paid off $500 apiece, $1500?

A They should have been, yes.

Q In your view, does a marker from a casino -- is that a form of indebtedness for your purposes?

A Yes.

Q Now, you know the order that was filed by judge -- was signed by Judge Greendyke said that the debtor is not allowed to incur any new debt without the written permission of the trustee.

Do you recall that?

A Yes, sir.

Q And the evidence is undisputed that in the year following the filing of the petition, and I believe after the order was entered, Judge Porteous, I believe the number -- signed up for 42 markers amounting to roughly $30,000. I could be off in my numbers.

But should that have been -- first of all, did that violate the order?

A In my opinion, it does.

Q Would the taking out of a new credit card undisclosed without getting permission, would that violate the order?

A Use of the credit card?

Q And uses it.

A Yes.

Q Okay. Oh. Do you recall correspondence with Judge Porteous or his counsel concerning Judge Porteous's interest in renewing leases for automobiles that he had?

A Yes, I believe I do.

Q Do we have that? Here we go. 296. I'm sorry, no, that's not it. 339, sorry.

Could you call that up?

Do you recall that?

A Yes, sir.

Q So Judge Porteous apparently knew that if he wanted to do a refinance, he had to get written permission to do it, isn't that right, at least with regard to that?

A I would think so.

Q And wasn't the same true with regard to refinancing a mortgage? Do you recall that?

A Yes.

Q And there was correspondence on that?

A I believe so.

Q Right. Did he get permission in both instances?

A Did I give permission? No, it was no major change. In fact, I think the leases stayed about the same -- if I remember correctly, leases stayed about the same, and the mortgage was a refinance.

Q But my question was, was that -- was he allowed to do it?

A I -- I gave him authority, yeah. I believe the order says the trustee -- I think in Texas, they allow the trustee to make that determination.

Q Right. So he was allowed to do the leases for the cars and the refinance?

A Yes, I believe so.

Q Okay. Did you remember that there was a -- do you recall that you had the 341 hearing with Judge Porteous?

A Yes, sir.

Q Can we call up Exhibit 130, please.

First of all, is that proceeding -- with the debtor, is the debtor sworn in?

A Yes.

Q So he's -- his answers are under oath?

A That's correct.

Q Okay. And you asked -- come down the page, you see where it says -- you say, your signature.

Do you see that?

A Yes.

Q The punctuation is a period, but I take it that was a question?

A Yes, it is.

Q You then go down, he answers yes. Then you go down to the next line, "everything in here true and correct." There's no punctuation after that, but I take it it was a question?

A Yes, sir.

Q And he answered yes?

A Yes, sir.

Q And what's the "in here"? What are you referring to?

A I show him a copy of the petition and the signatures on the bottom of the petition. And I'm presenting to him a copy of the petition itself and "in here" means in the petition.

Q Let's go to the next page, if we can, about a third of the way down. Do you see where it says "listed all your assets," and again that's a question, isn't it?

A That is. Everything in there is a question.

Q I understand. But since there's no punctuation, I better ask it.

And he answers yes?

A That's correct.

Q Do you see that?

A That's correct.

Q And then turn to page 4. And about slightly more than halfway down, you see where it says, "any charge cards you may have," do you see that?

A Yes, sir.

Q Let me read that. That's you speaking. "Any charge cards you may have you cannot use any longer, so basically you're on a cash basis now. I have no further questions, except have you made your first payments."

A That's still my procedure, yes, sir.

MR. BARON: Thank you, Mr. Beaulieu.

Oh, excuse me. I'm sorry, Madam Chair, may I -- Senator, may I continue?

VICE CHAIRMAN HATCH: Yes.

BY MR. BARON:

Q You testified earlier that based upon your objection to the plan as proposed, it moved from $800 a month to $1600 a month?

A $875 was the original plan. $1600 is actually what he paid per month for 36 months.

Q And why did you -- why did you do that?

A Why --

Q You forced that --

A Right. I filed a formal objection of

confirmation, saying that he did not give all disposable income, his expenses exceeded that which was considered a norm at the time, and that he had -- he did not pass liquidation value, and I believe -- and also that he had a tuition -- college tuition being paid, and not paying the unsecured creditors at 100 percent.

Q So that gave almost twice as much money to the creditors than they would have gotten otherwise; is that right?

A That's right. That's right.

Q Fair to say, Mr. Beaulieu, you didn't treat Judge Porteous any differently than you would any one of those other 40,000 people?

A The only thing I did was give him a hearing date away from everyone else.

MR. BARON: Thanks so much, Mr. Beaulieu.

THE WITNESS: Thank you.

VICE CHAIRMAN HATCH: Any redirect?

MR. TURLEY: Just a brief one, Mr. Chair.

VICE CHAIRMAN HATCH: Proceed.

REDIRECT EXAMINATION

BY MR. AURZADA:

Q Just to clarify two things -- actually, one thing.

The process of the Chapter 13 trustee's office objecting to a proposed plan and then reaching resolution with the debtor, is that uncommon, or does that happen frequently?

A It happens frequently.

Q This is just part of your job?

A That's correct.

Q Is that part of the process?

A That is the process.

Q And in that process, what is your name to do? Who are you -- on whose benefit are you acting?

A I'm acting for the unsecured creditors.

MR. AURZADA: Thank you.

VICE CHAIRMAN HATCH: Any recross?

MR. BARON: Nothing.

VICE CHAIRMAN HATCH: Any questions by any member of the committee?

Senator Whitehouse?

And we'll go to Senator Risch next.

EXAMINATION

BY SENATOR WHITEHOUSE:

Q Hi, Mr. Beaulieu.

A Yes, sir.

Q We've been told that had this been filed as a Chapter 7 liquidation, then the preferences and

the tax return would have gone into the estate that you would have distributed.

A That's right.

Q And that the unsecured -- the creditors would have -- there would be a difference for them because the tax return and the preferences would have added to the estate, there would have been more to distribute, and they would have been paid more as a result.

That's the way Chapter 7 works; is that right?

A That is correct.

Q Okay. We've also been told that when it's a Chapter 13 proceeding, that is based on the future income of the individual, and therefore, what is disclosed in the original schedule of assets isn't really as relevant.

And indeed, we were shown a table that showed Chapter 13 and what the creditors were paid, Chapter 7, what they would have been paid, and Chapter 7 plus the preferences and the tax return and others and what they would have been paid under that.

And it showed that under Chapter 13, Judge Porteous paid more than he would have either under

Chapter 7 as filed or Chapter 7 even conceding the Government's case that other things should have been filed.

Now, my question to you is would it have made any difference to the plan that you approved if you had known of the tax return and the other preferences. It strikes me that if it were 100,000 tax return or if the -- you know, there was a big asset gap, that there's a point at which it doesn't make any sense that the trustee would only look at future earnings and wouldn't look at what the assets on hand are as you're determining what the payment schedule is, if that helps illuminate why I'm asking this question.

Basically I'm trying to sort out, did it make a difference to anybody that these expenses or assets weren't properly listed since this was a Chapter 13?

A I believe they talked about the preferences were being about $3000, $2800, somewhere in that neighborhood; is that correct?

Q I think that was around that number, and $4000 for the tax return.

A In order to go after preferences it cost us money. I'd have to weigh the cost of going after

the preferences.

The tax return is a little bit different in that $4000 means about $300 swing a month. $3600, or 4000 a month. So now you're talking about $12,000 going into the kitty.

Q So that information would have made a difference in the plan that you approved?

A That and I -- because basically, when you get a tax return without a dollar amount, unless there's some type of earned income credit or something like that, that means that the debtor is overdeducting from his paycheck, so that means the paycheck I'm reviewing is down $300 from the get-go.

So I would have to look at that and say, well, your income should be actually $300 more per month. So that's in a three-year period about $10,000, which in this case would be about a 10 percent turnaround.

Q And that's something you would have taken into account in your decisions about the plan?

A Yes, sir.

SENATOR WHITEHOUSE: Okay. Thank you. I don't have any further questions, Mr. Chairman. Thanks.

VICE CHAIRMAN HATCH: Senator Risch?

SENATOR RISCH: No, thank you.

CHAIRMAN MC CASKILL: Okay. You will be dismissed. Thank you for your testimony. Thanks for being here.

THE WITNESS: Thank you.

(Witness excused.)

MR. TURLEY: Thank you, Mr. Chairman. The Defense calls Don Gardner.

VICE CHAIRMAN HATCH: Let me make a point that Judge Porteous has eight hours and 42 minutes left. The House has seven hours and 35 minutes left. So I would caution you to use your time wisely, because at the end of those hours, we're going to -- we're going to basically end this matter. So please be careful.

MR. TURLEY: Mr. Chair, we are retrieving the witness.

CHAIRMAN MC CASKILL: Mr. Gardner, would you raise your right hand.

Whereupon,

DON GARDNER

was called as a witness and, having first been duly sworn, was examined and testified as follows:

CHAIRMAN MC CASKILL: Thank you. Be seated.

THE WITNESS: May I make a comment?

CHAIRMAN MC CASKILL: Sure.

THE WITNESS: I'd like to preface my remarks by saying I took a fall. As everybody can see, my back is injured. And I didn't mean any disrespect. There was some scheduling problems.

When I left this morning, I just wanted to go home. I've never been hurt in my life, first time on pain pills. I'm off pain pills, shaky now because I'm nervous. But I've never had pain for 62 years. But don't fall off of a ladder.

And I got a lump on my head the size of an egg, my ear is ringing on this side, and I would just ask anyone who is asking me questions to speak loudly so I can hear you, I don't want to not be clear.

Thank you, ma'am.

VICE CHAIRMAN HATCH: You're starting to feel a bit the way we do, having listened to all this.

(Laughter.)

SENATOR RISCH: Actually he's in better shape than most of us.

CHAIRMAN MC CASKILL: Thank you. We apologize for your confusion. We're glad you're

here and appreciate your cooperation.

THE WITNESS: Political science major, I understand what's going on and I respect the Senate. I meant no disrespect by leaving this morning.

CHAIRMAN MC CASKILL: None taken, Mr. Gardner.

Mr. Schwartz?

MR. SCHWARTZ: Thank you, Madam Chairman.

DIRECT EXAMINATION

BY MR. SCHWARTZ:

Q Mr. Gardner, my name is Daniel Schwartz. I'm one of the attorneys for Judge Porteous. Good afternoon and thank you for coming.

Tell us a little bit about your background, where you were educated and what your profession is now, please.

A Graduated from UNO in '69, LSU law school 1972, practiced law almost 38 years, I guess, and started out in criminal law, some civil, moved away from criminal I guess about 20 years ago. I refer my criminal out now.

Basically, I do a lot of persons law in the state of Louisiana, which includes everything dealing with people, adoptions, divorces, custody, anything, wills, successions, those type of things.

Primarily I would say 80 percent of my practice is that. I do some personal injury. It's very good. I have a smidgen of small corporate clients, and just anything that I feel comfortable with, I usually take it. But most of the time I would probably limit myself to persons.

Q Where do you practice?

A I practice in Harahan, Louisiana.

Q And where is Harahan, Louisiana?

A Seven miles outside of New Orleans in Jefferson Parish in a little hook of the river.

Q Is your practice primarily in state court or in federal court?

A State court.

Q Do you know Judge Porteous?

A I do.

Q How do you know him?

A Judge Porteous was in law school in 1971, I think he graduated a year ahead of me. I knew him in law school. He came to Jefferson Parish working for the Attorney General, I think they sent him down there to handle a case. They liked him. He stayed. We reacquainted our friendship and we've been friends ever since.

Q Have you been good friends? How would you

characterize your friendship?

A Good friends.

Q Did you do things together on a regular basis?

A Tom Porteous stood at my wedding. He's the godfather of my oldest daughter. I shared -- for years, I guess up until 2000s, I had Thanksgiving dinner at his house, and go over.

I interfaced with his families. I grew up with all of his kids, and my kids. And we had a social relationship, you know, outside of law.

Q Did you -- you have birthdays about the same time; isn't that correct?

A My birthday is on December 12, his is on the 15th. We usually go out and celebrate at that time to remind each other that we're one year older.

Q Thank you.

Let me draw your attention to a case called Liljeberg v. Landmark. Were you involved in that case?

A I was.

Q How did you become involved in that case?

A As Mr. Mole, I think, repeated -- I'm sorry I ever met Joe Mole. He's an excellent lawyer, but I wish I hadn't. Someone called me, and

I looked back through my calendar, January of 1997 I think, and asked me to become involved. I told them no.

They told me what the case was about, told me what division of the federal court was in, I told them I wasn't in federal court, didn't think I could help them in any way. Let the conversation lie, got another call, they would like to talk to me. Please talk to them. Not interested in talking to them, I said.

Q I'm going to interrupt you, Mr. Gardner, to make clear some of the transactions. I apologize.

A Go ahead.

Q Who called you?

A Tom Wilkinson called me initially. He's a friend of mine and we've had cases together.

Q Who is Tom Wilkinson?

A An attorney in Jefferson Parish.

Q Is he the parish attorney?

A Was. I think he stepped down from that position.

Q Was he in that position at the time he called you?

A Ooh, '97, I don't know. I'd have to guess

probably, but I don't know.

Q What is the role of the parish attorney?

A Handle all the legal matters for the parish, review contracts. Anything that the parish would need by way of a lawyer, he would be the lawyer. He has a staff of lawyers under him.

Q Does he have a brother who is a federal magistrate?

A He does.

Q And do you know if that -- what was his -- what is his name, the brother's name?

A You're stumping me.

Q It's Wilkinson; right?

A I think it's Jay Wilkinson.

Q Do you know if -- that Mr. Wilkinson had involved -- excuse me, had any involvement in the Liljeberg case?

A Not to my personal knowledge, no, sir.

Q So you got a call from Mr. Wilkinson, from Tom Wilkinson, asking you to get involved. What was your response?

A No, not interested, can't do it.

Q Why were you not interested?

A Not a federal lawyer. It was beyond my expertise. And didn't want to do it.

Q Did you get approached again?

A I did.

Q And what was the nature of that call?

A Follow-up call. They just want to speak to you, Donny, everybody who knows me well calls me Donny. And I said I don't want to do that. And ultimately convinced me to go talk to Joe Mole. And I sat down with Joe Mole, and Joe Mole said he wanted me in the case.

He would say, you know, he wanted to have a pretty face at the dais, and obviously I've got a pretty face.

Q What did he mean by a pretty face?

A You know, someone who knew the judge. He was concerned that in October of '96, the year before, that a motion to recuse had been filed and his client lost it. Big money in this case in this case. They were not going to let anything deter them from an effective presentation, and they thought that would entail also having at the bench a friendly face.

And I told them that I don't think that works. And I told them at that I don't know, I don't know if that's the second or first meeting, I said listen, Judge Porteous is going to listen to

the evidence, he is going to rule on the facts. My presence there will not affect the outcome in any way, shape or form. And he said, well, we don't know the skinny on Judge Porteous, Mole says.

And I said what do you mean? He says he we don't know who he is, he's a fresh judge, this is '97, I think Tom -- Judge Porteous took over in '94. And he says we'd like to know how he thinks about stuff.

I said, well, he read the federal civil procedure and memorized it, because he's got a fine memory. He'll beat you in the head with a procedure book. And I said you better be prepared, and he was, all certificates, memos and filing were prompt, I think I helped him there. And I told him, build a record, the judge is going to let you get everything in. And I think Mr. Mole at every stage of the proceedings said Judge Porteous gave him a fair trial. Judge Porteous gave everybody a fair trial.

People liked the fact that Judge Porteous would let you try your case, and he wouldn't cut you off. He'd let everything in.

Q I'm going to cut you off again.

A Thank you.

Q Did the time come when you agreed to

represent Mr. Mole's client?

A They don't deal through me, they deal through Tom. Because they know I already said no. They faxed a proposal to Tom Wilkinson, and he calls me up, Donny, look, these people want to offer you a serious chunk of money. And I said Tom, I'm not interested.

Oh, you'd be a fool. He called me a name, not a nice name. And I said Tom, no. And he said come on, just go talk to people. Come on, we'll get together and talk. He says they just want you to sit there, help them out, read Judge Porteous, decide whether he's angry or upset, what's he going to do, interface in the case and participate.

Q Did you finally agree?

A I did. I agreed on one condition.

Q I'm sorry, I interrupted you.

A You didn't. I agreed on one condition. I told Mr. Mole I would not be whored out. And by that, I mean I said I would participate in the case, which I did, spent 16 days, one day just Mr. Mole and I and five of the lawyers on the other side in a mediation. Because Judge Porteous thought we were close enough, he says you guys need to talk, you all are wasting a lot of time here and you all not

talking, and sent us down to talk. And we spent the whole day talking because he didn't talk numbers to us, he was not giving anybody a feeling on where the case was going. He just thought that they should all get together. And we did that.

But I told Mr. Mole that I did want to participate, I wasn't going to sit there as a pretty face, and he allowed me to do that, I have to give it to him. I prepared two witnesses, they ultimately decided to let someone else take them. I filled up 11 tablets of notes. I told them what I thought. Every day after court, Judge Porteous would have Mr. Levenson and myself, two or three of us go back, two per side, and he would go over the next day's thing.

And again, I'm not a federal lawyer, but I can tell you he goes down a list and he says duplicitous. And I said excuse me, your Honor? I've heard from that witness, I'm not hearing that witness, struck. Tell me what they're going to say that was different from the other three people who testified to that point, and I'll allow him in. But I'm not going to hear it just for the sake of you guys blabbering, I've already heard enough on it.

We'd go back and do the next day's

preparation and deal with documents. This was a case, a document nightmare, 12, 14 volumes, 3 inches thick. And the guy who was operating the little screen trying to get it electronically, he was a dodo, it never worked.

(Laughter.)

Q Unfortunately, we don't have those here, but we do have the screens and the documents.

CHAIRMAN MC CASKILL: And we do have repetition of a lot of information.

(Laughter.)

MR. SCHWARTZ: Madam Chairman, I think I knew that was coming.

CHAIRMAN MC CASKILL: Yes.

BY MR. SCHWARTZ:

Q Did you enter into a written agreement?

A I did.

Q What were the terms of that agreement?

A Mr. Mole was prepared to pay $100,000 for my participation, flat fee, for my participation in the case. And I understood that.

There were additional provisions, and one that stands out that I know everybody is going to be interested in, is that they also included $100,000 if Judge Porteous would recuse himself.

Now, remember, they had filed a motion to recuse Judge Porteous in October of '96, he had said no. But for some reason that provision was in there.

There were other provisions about stage payments, incentive payments as he said, to keep me interested.

Like he said, if I represent a client, I'm going to represent them. I don't sell people out. I practiced 38 years. Mole got to know that. I think he felt secure that I was on the team and I wanted my team to win. I always want my team to win. I graduated from LSU.

Q Did you form an opinion as to why you had been offered a provision in your contract for an extra $100,000 if the judge recused himself?

A At the time or now?

Q Well, let's say at the time, and then we'll --

A At the time I didn't.

Q What about now?

A Now I have a real strong opinion. I think that provision, incentive provision or what, was to get me to either encourage someone to get off the case for an extra $100,000. I think they already

thought I was a prostitute because it was a lot of money. They just didn't know how high the number was going to go.

But I didn't -- I never did that. I never approached Judge Porteous and asked him to remove himself. I knew -- as I told Judge Jones at the 5th Circuit, and she became enraged at me, I said I didn't know of any additional facts that would allow a recusal motion to be successful or to be heard.

She just went crazy, don't you have an ethical and moral obligation for your client? And I said I do. But she doesn't even know the standard. You better have some facts to recuse a federal judge. You don't walk in, oh, I think maybe they had lunch together, I think they used the same handkerchief.

I knew none of those. I knew Amato and Creely were friends, I knew they went hunting and fishing. I didn't know anything that you people have tried to bring out along the way, if it's true or false.

Q Let me step back for a minute. You bring up many subjects as you speak. You said that you form the opinion now that -- restate.

What did you think your client then wanted

you to do with regard to Judge Porteous and Judge Porteous's participation in the case?

A Let's make this crystal clear. When I signed on beside telling Mr. Mole that I would participate, I wasn't going to sit there and just look around, I also told him that I was never going to ask Judge Porteous to do anything immoral and illegal. And I said that a number of times.

By that I meant I was never going to put the judge, even though we were friends, I've never in all our years, in a position that would cause him uncomfortableness.

I wasn't going to go to him and say, hey, listen, I get $100,000, get off the case. Wouldn't do that. And I didn't.

Q Have you formed an opinion as to whether that's what they wanted to do?

A Read the contract, listen to my testimony. Somebody has got to decide that. As a factfinder. I'm just going to tell you, it was there, I think it was a big incentive. I think somebody thought I was a trout and I would bite.

I have to tell you, I've been around a long time. This is the first time in my lifetime my ethics and professionalism has ever been questioned,

because I don't do that.

Q You've known Tom Porteous a long time?

A A long time.

Q What is your opinion about how he would react if you were to tell him about a clause like that?

A Tom wasn't that kind of judge. He would have reacted poorly.

First of all, let's talk friendship first of all. He would have been offended that a friend of his would have asked him that, number one.

Number two, I think as a judge, he would have really become enraged at me, and knowing Tommy, even though I'm his friend, he may have done something more, may have taken another step along the way.

I would expect that if someone tries to subvert the system that way.

Q Do you think that agreement, as you look at it now, was improper?

A That's for you to decide, Mr. Schwartz. It's aggressive.

Q Did -- you received $100,000 to start as a retainer?

A I did, March 13, 1997.

Q Did you pay any of that out to anyone else?

A Mr. Wilkinson, as I told you previously, and I had a relationship on cases. He'd send me persons, divorces, successions, things like that. We had a working relationship. And I guess some motivation was there for him to get me involved, because he ultimately took a nice part of that fee.

Q How much was a nice part of that fee?

A I think it was $30,000 he asked for.

Q And you gave him that?

A His participation in it was interfacing with these people and, you know, trying -- he was the go-between between the Mole group and me.

Q Was there -- during the trial of the Liljeberg case, and you were there every day; is that correct?

A Every day, every night, every morning. We met around the clock. It was a serious case. We had suppers together, we met with Gary Ruff, the lead counsel that came in from out of town. Every night, every day.

Q Did an event occur that you recall in which some books fell on the floor or came to go on the floor?

A I'm going to repeat myself. This was a document nightmare. The volumes had been stacked before Judge Porteous's dais up there, and they were all like dominos.

At some point in a sidebar, moved it, and they just went boop, boop, boop, boop. And unfortunately, Joe Mole may have been standing in that direction and Judge Porteous didn't throw -- I guarantee you, I was eyewitness. He didn't throw anything. They just fell over. They were top-heavy to begin with. There were so many of them.

Q That was an accident, in your view?

A An incident, not really -- an accident, yes. A misfortune.

Q But Judge Porteous didn't throw them like soccer balls at Mr. Mole?

A He did not.

Q Did -- were there any discussions in that case that you know about involving possible settlement between the parties?

A Oh, the parties went round and round. Every couple days after we had a series of witnesses and somebody thought they had made a point, we'd go for this million, and they would go for that million. And there were constant hallway

discussions. There were discussions when the case settled. We still had discussions. Lead counsel wanted to get us all together again. They had a new proposal. And none of it ever went anywhere.

Everybody was so dug into their position or what they thought where they wanted to be, it's hard to settle cases.

Q Did your client ever make a monetary settlement proposal to Liljeberg?

A Many. We made many monetary settlement proposals to Liljeberg.

Q Can you tell us a little bit about the size of those proposals?

A I have to tell you, I can't. I have to tell you, they range from a low 12, 15, 18 million, and I think shy of 30 million at some point in time. I don't think they went over $30 million.

But it was substantial, a lot of money.

Q But there was a settlement proposal of $30 million from Landmark?

A A discussion. You know, this is in the hallway, after a certain witness and somebody thought they had done well, you know.

Q Okay. Let me talk a little bit about the culture, the legal culture in Gretna.

A We've only got four hours left.

Q I understand. I'll try to make my questions pointed and ask you for pointed responses.

The legal community in Gretna, was that a fairly small group of people, not a lot of lawyers?

A It's larger today than it was, but at one time it was small and everybody knew everybody, it was a tight-knit group.

Q The lawyers knew everybody?

A Everybody knew everybody.

Q Okay. Was it customary for lawyers and judges to have lunches together, have meals together?

A Very much so. In fact, one of the local cafeterias over there had a table set out for lawyers and judges, a long table. And you walked in, and everybody sat down, take your order, tear it off the little sheet, and everybody would pay and eat and come and go. People would come and go in different parties at different times. You'd say hello and go back to doing what you did. Judges went back to cases. Lawyers either went back to court or back to their office.

Q What was the name of that cafe?

A Whitesides, Palace Cafe, Courthouse Cafe.

It's changed names over the years.

Q Did you have -- did you have other somewhat more expensive lunches with Judge Porteous from time to time?

A Yeah. I was Judge Porteous's Jiminy Cricket. I limited him to two drinks. I would put his cigarette out if he went to the bathroom. That's what friends do, I believe. I get irritating at times my wife tells me, but that's what I do.

We did go out and have nice lunches. We didn't do that every day. Let me give you a period so I can go real fast. From the time Tom and I are lawyers, Judge Porteous and I are lawyers, until he gets on the state bench, a couple times a week we would meet with a group every other Friday, go out and have a nice lunch, everybody treat each other.

When he got to be a state judge, we went out to Whitesides, and every once in a while we'd go to a bigger, nicer hamburger joint, little Italian or Chinese restaurant, something like that. Nothing fancy.

At various times we'd go out to better restaurants, but that was for a celebratory thing, not -- not every day.

Q Did -- who paid for those lunches?

A Porteous paid his fair share always as a lawyer. When he got to be a judge, he paid for his fair share when he was at Whitesides. He's paid for lunches. Every year, Tom had -- went to CLEs we'd go to, he would buy eight, 10 lawyers lunch, supper, just all the lawyers together, the tip and everything, which everybody looked forward to that.

Q That was at a CLE, an annual CLE?

A Yes. Yes.

Q Did you ever give any gifts to Tom Porteous?

A Yes, sir.

Q What gifts did you give him?

A Sweaters, pens, shirts. I gave him some -- I thought he drank gin in his earlier days, I remember giving him a bottle of that.

But my wife would buy the gifts at that point in time, and there was always gifts at Christmastime, always gifts at birthdays, always gifts for the kids.

And Mel, bless her soul, she's gone, she was always generous to my daughters. They always gave something appropriate and nice at Christmastime.

Q So you would reciprocate gifts?

A Absolutely. Our families did that on a regular basis, prior to 2000.

Q Thank you.

After he became a federal judge, did you continue to do things socially together?

A You know, after 2000, that changed a little bit. My wife had some problems and she was dealing with those, and we didn't get to go many places and do a lot of stuff.

But yeah, we still did things together.

Q What about in -- when he became federal judge, which I believe was in 1994?

A 1997?

Q '4 or '5?

A '4?

Q Yes.

A I'm sorry, '4.

Q Did you continue to see him as often when he was on the federal bench?

A When he got to the federal bench, I was proud of him, happy for him, tried to get down there once a week, you know, just to see him, because he was not there anymore. I'd get -- Porteous had a very interesting courtroom. You could go there, use the phone. In those days, no cell phones. In the

early days you could go to his courtroom, use the phone, you could use the toilet, get a glass of water, you could do things. It was an open courtroom.

Everybody saw him, and it was kind of fun to have a legal community like that.

When he got down here, it's cloistered, locks and walls and everything that we have these days. Took my shoes off so many times today I'm going to have to have them resoled when I get home.

All of this security stuff. When he got down there, it was hard to see him. Then it went from every other week to once a month. I left a message once, described myself and why don't you give me a call. I'll call you next Tuesday, I'm sorry. Next Tuesday would come and he'd be busy.

We weren't as close or as frequent after we got down there, but we tried to get together as often as we could.

MR. SCHWARTZ: Thank you, Mr. Gardner.

THE WITNESS: Thank you, Mr. Schwartz.

CROSS-EXAMINATION

BY MR. SCHIFF:

Q Mr. Gardner, I think you said in your testimony that Judge Porteous is one of your closest

friends in the world?

A I didn't say in the world, but he's a close friend.

Q But you would describe him as one of your closest friends in the world, wouldn't you?

A He's a close friend.

Q Could we call up page 5 of Exhibit 32. This is your testimony before the Fifth Circuit.

A "One of my best friends in the world," okay.

Q "But I have to tell you I'm Tom Porteous" --

A Yes, sir, I agree with that statement. I made that. I read it.

Q Is that a fairly accurate statement? You were that close? You've been in each other's weddings, godfathers. Do you have many closer friends than Judge Porteous at least at this time?

A Yes, sir.

Q So he is --

A He's one -- was one of my closest friends. Since Mel died, it's been a different thing.

Q Would you say, you know, up until his time on the federal bench, maybe during the early part of the years on the federal bench, there was probably

no one outside of his family who knew him better than you did?

A I knew him well. I don't know if anybody knew him better than I. But I knew him well.

Q And when the FBI came to interview you because of your close friendship with Judge Porteous, you were somewhat less than candid with the FBI, weren't you?

A I don't think I was. I think -- I want to go on record, the FBI agent who interviewed me came in, asked me what I did for a living, and I told him I did family law. He spent a whole hour talking about a problem that he had related to family law and in the last three seconds -- can I finish? In the last three seconds, he said, oh, by the way, is Judge Porteous a good guy and I said yeah, he's a good guy. He asked me if he had any aberrant sexual behaviors, I remember that as one of the questions, and I said not to my knowledge.

Q You can certainly finish your answers, but it will go a lot quicker if you address your answer to my question.

A Okay.

Q Were you somewhat less than candid in your interview with the FBI?

A No, sir, I think I -- no, sir, I think I answered the FBI to the best of my knowledge. If you'd like to point out some of my uncandidness, I'd be happy to reply.

Q Well, I certainly will. If we could pull up Porteous 347, this is your FBI 302. Do you recall being asked whether Judge Porteous ever was known to abuse alcohol?

A No.

MR. SCHIFF: Could you highlight that statement for me.

MR. TURLEY: Madam Chair, I just wanted to object. If the Congressman is using this document to impeach, he hasn't posed a question as being impeached by the content of the document. He simply went to the document, he's pulling out lines.

CHAIRMAN MC CASKILL: I believe he asked him if he recalled saying he'd abused alcohol. He may be using it to refresh recollection, I don't know.

MR. TURLEY: Maybe the Congressman could be clear, but usually if he's going to be impeached or refreshed, he's given a question first, such as did he use alcohol, and then if the answer is in conflict with the 302, then it can be used for that

purpose.

MR. SCHIFF: Madam Chair, may I proceed?

CHAIRMAN MC CASKILL: I think the question was whether or not he was going to be candid with the FBI investigator, so he may be impeaching him on that basis.

So go ahead, Congressman Schiff.

MR. SCHIFF: Thank you.

BY MR. SCHIFF:

Q Mr. Gardner, do you recall telling the FBI that you had never known of the candidate to abuse alcohol?

A I wasn't asked that question, sir.

Q So if we look at the record of your interview, where it provides "Gardner has never known the candidate to use illegal drugs or abuse alcohol or prescription drugs," your testimony would be that that's a false statement in the 302?

A My testimony is that's a synopsis of someone who didn't do his job and filled in the blanks. He never asked me that question, sir. I told you, he spent the entire hour talking about his personal problem with me because he was very concerned about it, and spent three minutes at the end and says, Porteous an okay guy? And I said as

far as I know. Is he competent? I said very competent lawyer. He'd make an excellent federal judge. I said that about him.

But he never asked me about drugs or alcohol, sir. I do not -- I do not remember that question specifically.

Q So your testimony, Mr. Gardner, is that the only things he asked you, other than his personal family situation, that part of the interview lasted about three minutes?

A Three minutes. And he ended up, did Judge Porteous have any aberrant sexual behavior patterns, and I said not to my knowledge. That was the last question he asked me, which I thought was strange. But he did ask me that.

Q So all of the information in this 302, according to your testimony, was gathered in the last three minutes of the interview?

A Sir, what I'm telling you, that that interviewer did not do his job. He came in, he was fascinated with the fact that I had some knowledge about an area of the law, and he asked me personal questions for almost the entire hour. We went on and on.

I'm thinking to myself, when is this guy

ever going to get to the interview? He's here to interview. And he never gets to the interview.

At the end, how is Judge Porteous? Is he an okay guy? I said he's an okay guy, very good guy.

Q And Mr. Gardner, do you recall the FBI agent asking you if you knew of any financial problems that the candidate might have?

A I knew of no financial problems that Judge Porteous may have in 1994. No, sir.

Q That's what you would have told the FBI agent?

A If I was asked that question, that's what I would have probably told him, that as far as I knew, Tommy seemed to have his finances in control. Even though we were close, he never shared with me any financial problems, and I wasn't aware of any financial problems.

Q Could we call up page 62 of the grand jury testimony, Exhibit 33.

I'd like to read a portion of this to you and see if you recall testifying to this in the grand jury.

MR. TURLEY: Objection, Madam Chair. This is a grand jury transcript. Once again, we have no

question. I'm not too sure why this is being introduced. But there was a previous ruling on the use of grand jury transcripts.

MR. SCHIFF: Madam Chair, I have just --

CHAIRMAN MC CASKILL: I believe that he should have an opportunity to ask the question. Is your objection that he can't use the grand jury testimony to impeach?

MR. TURLEY: He's just brought up part of the grand jury, he hasn't asked a question yet. And I was just --

CHAIRMAN MC CASKILL: I think -- I think we need to wait for him to ask a question, see if whether or not it's appropriate or not. He can impeach him with his grand jury testimony. You don't quarrel with that, do you?

MR. TURLEY: No. But I know of no question that he's asked. Usually you ask the question first.

CHAIRMAN MC CASKILL: Why don't we give him a chance to ask it.

MR. TURLEY: Okay. Your Honor.

BY MR. SCHIFF:

Q Mr. Gardner, do you remember being asked in the grand jury a question, "did Tom Porteous have

a good idea of what his financial situation was"?

"Answer: "Oh, I don't know that. I don't know that. I think he was always short. I think that's why, you know, he would ask me from time to time for money for stuff, you know, to buy gifts, to do this or whatever."

Do you recall testifying to that in the grand jury?

A Yes, sir. Don't take it out of context. When I say "short," there's no paper in his wallet. That's short. I don't mean short from a financial standpoint. I think you're reading something into that.

And what I said, and if you look at it, it said I believe that Tom's wife, who hung around with doctors' wives, liked to keep up with the Joneses. She told my then wife, you should have a furniture bill, make sure your furniture is up to -- hell, I bought a Duncan Phyfe set that's 20 years old for $400 and I was pleased with it.

Q Mr. Gardner, you were asked by the grand jury not whether Judge Porteous always carried money in his wallet, not whether he sometimes forgot his wallet. You were asked about his financial situation. And your answer was "I think he was

always short." Did you tell that to the FBI?

A FBI?

Q When the FBI asked you if he had a financial problem --

A I told --

Q Please let me finish the question, Mr. Gardner. When the FBI was doing a background check on Judge Porteous and they asked you about his financial situation, why didn't you tell him that you told the grand jury, that you thought he was always short?

A I just explained that. I'll do it again for you so that we can make it clear. When I said "short," I meant that he didn't carry money around in his pocket. On the occasions that he asked me, Donny, you got two 40s or two 20s or 40 or whatever, that's what I meant.

If you go on to read that, I said that I -- go to the last line there before you take it off the screen, and you will see, I don't know anything about that. Let's read it all, if we're going to read it, let's make it clear and get the full context, because take -- I'm good at taking stuff out of context, because you can do wonders with it. I don't want you to take my testimony out

of context.

Can we put the page back on where it says, you know, I don't know about his finances? That was at the bottom, wasn't it?

Q Mr. Gardner, I'd be happy to show you the quote again. Would you like to see it again?

A Let's see the page again.

Q Let's pull it up on the screen.

A No, wrong page. Yeah, right page. "Did you tell Porteous have a good idea of his financial situation was?

"Answer: Oh, I don't know that." Line 23, "I don't know that." Line 24, "I think he was always short."

When I said short, I explained to you what I said about short. I meant between him and I. I didn't mean height or that he had financial problems.

Please don't read the word "short" financial problems.

Q Mr. Gardner, I wouldn't want to put words in your mouth.

A Please don't. You won't.

Q I understand when you testified before the grand jury that he was always short, you didn't mean

that he had financial problems. That's your testimony today; correct?

A In retrospect, I learned of Tom's bankruptcy and called him up, somebody in the courthouse told me about it, and he sheepishly told me that. That was the first time that I became aware of any financial problems that Tom Porteous had.

They lived well, the kids were well dressed, they went to good schools, they always had lavish parties at their house, they had good food.

Everything was perfect at Tom Porteous's house, Judge Porteous's house.

Q And Mr. Gardner, from time to time you also would give Judge Porteous money to gamble. Isn't that right?

A From time to time throughout our relationship, before he was ever a judge, he'd ask me for a few dollars. And you have got the transcript. We were out shopping for gifts at Christmas season, he had run out of Christmas money, I guess, and I had some on me, and he asked me for some money to buy glasses for his wife.

When he became a judge --

Q Mr. Gardner, I'm not asking you about

Christmas presents right now. I'm just asking you about gambling.

A He would.

Q This is a yes-or-no question. Did you or did you not from time to time give Judge Porteous money to gamble?

A No, I gave Judge Porteous money. I told you already, if you read it, I don't know what he did with it. I presume that he gambled with it because he took it sometimes at CLEs, he would come by, everybody would have supper and everything, he would come by and said Donny, you got $100 on you? I gave you $100. Tom is a bummer. If he's out of cigarettes, he's going to bum a cigarette. If he was out of money, he would bum money.

I didn't expect -- as a friend, I gave it to him. And as you say, as a good friend I gave it to him. I would have given it to him willingly. I gave it to him with no expectation that he would ever do anything for me as a judge or that he would do anything dishonest that I was buying him. It didn't come in a bag, box or envelope. It came out of my wallet in front of everybody if he asked me for it. That's the sum of it.

A friend giving money to another friend.

And the Jiminy Cricket told him not to gamble. At some point in time, he'd be out having a few drinks and gambling. I don't gamble. I think it's a con game.

But there are a lot of people who don't think that.

Q Mr. Gardner, this will go a lot quicker if you will confine your answers to my questions.

Let's call up page 31 of the grand jury transcript.

A Yes, sir.

Q You just testified that you didn't give the judge money knowingly to gamble. In your grand jury testimony, you were asked.

"Question: Did you ever provide Porteous with money to gamble?

"Answer: I did.

"Question: Can you tell us when that happened?

"Answer: I wouldn't say often, but when I was with Tom, he'd come up to me and I was -- I don't know the proper word to say, we're such good friends, Donny, you got $200, can I borrow $200 from you? I'm a little short."

A "I'm a little short."

Q Please let me finish.

A Same "short" I referred to before.

CHAIRMAN MC CASKILL: Mr. Gardner, you can't interrupt the question.

THE WITNESS: I'm sorry, ma'am, I won't.

CHAIRMAN MC CASKILL: Thank you.

THE WITNESS: I apologize.

CHAIRMAN MC CASKILL: Thank you.

BY MR. SCHIFF:

Q "I'm a little short. I'd give him the $200, can I borrow a hundred from you, you know, and I'd give it to him."

So you did give him money to gamble, didn't you, Mr. Gardner?

A I gave him money while we were at gambling institutions. Would you go back up to line 1 through 5 also?

Q If you gave him money to gamble at gambling institutions, then why a moment ago did you say you never knew whether he gambled with money you gave him?

A I didn't know. I gave it to him at CLEs that were held at gambling institutions. Okay. I would presume then, if you want to be perfectly honest, I don't want to beat around the bush, I

guess he was going to gamble with it or go buy a drink with it or meal or something. He was going to do something in the casino with that money, and gambling is one of the, A, B, C, A is gambling.

Q Judge Porteous from time to time sent you curators, didn't he?

A He did.

Q In particular, there was a time in your practice when you had left your firm and you'd started your own practice where you needed help paying the rent, paying your secretary, and your very close friend, Judge Porteous, started sending you curators to help you pay the bill. Isn't that right?

A That's correct.

Q I think you testified as well in the grand jury, but let me ask you, you also gave him money for his son's externship; is that right?

A Timmy -- I'm sorry. Timmy Porteous externed for the Senate, I believe, or House in 1994. Everybody was proud of him. I think they had a party and I questioned the then wife and she said that she put a check, she believes, in an envelope, you know, congratulations. Because everybody was very proud of him. There were not a lot of kids in

the circle of friends that we all had and had nice friends that had that opportunity, and they were taking up gifts for him to defray his expenses. You guys don't pay for your externs, I understand.

Q Did Bob Creely tell you he was also sort of hit on by the judge to pay for externship?

A I think about the same time a number of friends had been asked to participate in the party or to give a gift to Michael -- excuse me, Timmy -- he's got a Michael son too -- Timmy for his externship.

Q Didn't Bob Creely call you and tell that "that rotten bastard is hitting me up for money for his son's externship"?

A You called Bob Creely. You watched his demeanor. He did say that. It's Bob. He didn't mean anything by that. That's the way Bob reacts to everything.

Q You don't think he felt put upon by the judge who kept hitting up for money?

A In a lot of all this testimony, I guess he felt put upon. But I didn't feel put upon giving Timmy a few dollars to -- a minor few dollars to offset his extern. But Creely did say that, yes, sir, that is a factual statement.

Q I want to ask you about the Liljeberg case. You testified that when you were brought on, you really knew nothing about federal law or federal court. That wasn't why you were brought on; right?

A Yes, sir.

Q And I think after you testified about the circumstances in which you were brought on and why Mr. Mole wanted a handsome face at the table --

A Thank you.

Q -- I think you testified in retrospect, in looking at this, you think it was unethical.

A I didn't say it was unethical. I think I was asked that. I think the ethical representation of a client is what I did in this thing. I gave my all for that client. I gave every hour, I read every document, I participated.

I did what they asked me. Mr. Mole, if you will remember his testimony, in all of the places he's testified, said Don Gardner did a good job, he did exactly what we asked of him. He gave us input, not only with the judge, but I ultimately learned the case, and I was talking to them about witnesses and about strategies and other things, because I started to enjoy that case.

It was an interesting case.

Q I thought I understood in the latter part of your testimony on direct that you were suggesting you thought there was something unethical in the way you were brought on to the Liljeberg case, that the amount of money they were throwing at you, that --

A They threw a lot of money, yes, sir.

Q Is it your testimony that you think there was something unethical about bringing you on to be basically their friend of the judge?

A They wanted to have a face at the table, and I guess because I had refused. And I was not refusing to increase the price of the fee or the cost.

Q My question, Mr. Gardner, is were you suggesting earlier that you think this is unethical that they brought you on to this case?

A No. I don't think it's unethical that I joined a case, okay.

Whether you read into it my presence there and my friendship with Judge Porteous. But remember now, my presence on that, I told everybody so that there would be no unethical even assumption or thinking I was going to do anything, to say listen, guys, I'm not going to do anything other than participate as a lawyer in this case. I'm not going

to go behind closed doors and ask the judge for any favors. I'm not going to do anything other than represent my client to the best of my ability. And that's what I did.

Now, whether you want to read into that contract -- because it's a convoluted contract. I think it's an enticing contract. But for someone who has no scruples, it's unethical.

I think I have scruples, so therefore, it didn't become unethical. Had I gone behind the door and did the $100,000 recusal, unethical. Had I tried to manipulate the numbers with Judge Porteous, one of my best friends in the world, Tom, look, just give me another this, I get $200,000, I get to take it home, I wouldn't do that, that is unethical. That's what I'm telling you.

Q So Mr. Gardner, I want to make sure I understand the ethical standards you're applying. You're suggesting, then, that it would be unethical of you to join the case, be successful in getting the judge recused from the case and take the money, but to take the money, even though he didn't recuse himself, that's okay? To take the contract with $100,000 if he recuses is okay, as long as you don't follow through on what the contract hopes will take

place? Is that your testimony?

A It's unethical for me to accept $100,000 and try and get the judge off the case. The judge had already heard a recusal motion, you heard me before. I knew of no reason to refile or to initiate another recusal.

And had I done that in any way, shape or form, in trying to go after that $100,000 incentive in that contract, that would have been unethical on my part.

Q Did you think you had an ethical obligation to disclose to your client the kind of relationship you knew Bob Creely and Jake Amato had with the judge?

A Judge Jones asked me that question, you got the transcript there, and I said no. And I'll say no now.

Because I knew of no unethical relationship that they had. I knew that they were friends like us. I knew they went out to eat. I've gone out to eat, the four of us have gone out to eat at lunch, where around the courthouse we'd all go out to eat.

I know of nothing, I knew of no facts that made the relationship between those two lawyers and

Judge Porteous unethical, immoral or in any way that I could go tell my client.

My client was afraid because they thought that they were friends. That's the only reason --

Q Mr. Gardner -- and I think you testified that you understand the ethical standards better than Judge Jones; right? Wasn't that your testimony?

A I can't say that, sir.

Q Wasn't that your testimony on direct, that you understand the ethical standards, Judge Jones doesn't really understand them?

A I can't say that.

Q Let's take a look -- you invited us. Let's take a look at the Fifth Circuit testimony that's page 472. Let's start at the bottom of the page.

"Chief Judge Jones: No, sir, I'm asking you a question. If you'd known of the facts that would -- of a relationship between Judge Porteous and counsel for the other side that would have required him to make a disclosure for purposes of recusal motion, would you not have had an ethical obligation to tell your client?

"The Witness: My client already knew that

Judge Porteous --

"Chief Judge Jones: Would you not have had an ethical obligation? Answer yes or no, sir.

"The witness: No, ma'am."

A Let's go back now. She says on line 5, you're taking this out of context --

Q Mr. Gardner, I'm not finished with my question. I would also like to read the continuation of this discussion with Judge Benavides on page 475, beginning with Judge Benavides -- excuse me, beginning with the witness, "We were giving it to Timmy Porteous, because we knew the young man as long as I did, your Honor, this had nothing to do with influencing Judge Porteous in the case or anything like that. It was a social thing.

"Judge Benavides: I can't understand that. I just cannot understand that a professional held to the standards that were supposed to be held to, I'm not talking about as a judge, I'm talking about as a lawyer, that if I had a client and I had information like that, that I wouldn't feel that it was my duty to tell my client or to tell the lead counsel in the case who had previously filed motion to recuse and had not had that particular information in his motion, which would have

triggered at least, even if he forgot it, a responsibility to advise all counsel that he had received money from these lawyers in the past, including you, which was never done. And you're acting like it's no big deal, like -- like this is some kind of culture. I can't understand it. I can't understand why you're not shocked or ashamed."

Do you think Judge Benavides and Judge Jones don't understand the ethical standards? Can you tell us --

A They were witch hunting, in my opinion. And if -- they initiate that whole line of question, do you not think you had a duty to inquire.

Inquire of what? Do I take a deposition of these people? Do I subpoena their bank records to see if there's a check written to Judge Porteous?

She said duty. I'm telling you what I knew. I knew they were friends. I told Judge Jones I knew they were friends.

The motion had already been heard that they were friends. Please, I knew of no other incident, other than what you people have tried to bring out, that would have allowed me to inquire or tell my client.

My client came in telling me, we are

afraid Porteous -- Amato, Creely and Porteous are friends. Is that true?

Q Mr. Gardner --

A They had already made that inquiry, Counsel.

Q Mr. Gardner, if I could. So you're brought into the case after the recusal motion, when Mr. Mole, who made the motion, doesn't know of the money going from Mr. Amato and Mr. Creely to the judge, doesn't know about any of this stuff that you know about, just let me --

A I don't know of any money going from Mr. Amato and Mr. Creely --

Q Let me finish.

A -- to the judge, sir.

Q Let me finish, please.

A Okay.

Q You know of the relationship that the judge had with these two lawyers that was the subject of the recusal motion, you know that Mr. Mole doesn't know the facts behind it, and you say nothing. And you think that's perfectly fine for your client.

Is that right?

A Say nothing about what? What do I say

nothing about? I told -- they knew that they were all friends to begin with. That brought some fear to them, because they thought that the judge would lean toward a friend. I told them he wouldn't.

And then I don't know -- what are you telling me I knew that I should have disclosed?

Q Do you think, Mr. Gardner, that if you knew the judge was hitting up Bob Creely for money --

A I didn't know that, for the second or third time. I didn't know the judge was hitting up Bob Creely. Oh, for the gift for his son? I knew that. I knew that everybody in the judge's circle had been asked to participate in a gift for Timmy Porteous so that he can extern. I knew that.

But you're telling me that --

Q So Mr. Gardner, you've got a multi, multimillion dollar case, and you get hit up by the judge in that case --

A Sorry, sir, that is a -- don't say "hit up."

Q You can characterize it how you'd like.

A I will.

Q You get asked for money by the judge while that case is under submission, you know that a

counsel from the firm on the other side is also getting hitten up by that rotten bastard for money.

A Wrong.

Q And I think you have no disclosure duty?

A Wrong. Timmy Porteous's externship is in '94. I join in '97. The case is tried in '97. The extern occurred before the case even went before the judge.

Q So you knew when you got on the case --

A Do you know those dates, though?

Q Mr. Gardner, according to your recollection, then, you knew when you got into the case that one of the attorneys from the opposing firm had given money to the judge, and you felt no disclosure duty on that, and you didn't feel any disclosure duty that you had given money to the judge for his son either. Is that your understanding of the ethical standards, that Judge Jones doesn't understand and Judge Benavides doesn't understand?

A No money was given to Judge Porteous for the externship of Timmy Porteous. You're trying -- your question -- you're totally wrong.

The moneys that the rotten bastard, Bob Creely's comment, were just the fact that someone

asked him for something. That's Bob's way.

But the money went to Timmy Porteous. It was a gift to a friend's son. I knew Timmy Porteous the day he was born. I just hugged him in the hallway when I entered here. And I've known him. And he's a fine young man, a fine lawyer.

And you tell me there's an ethical problem with me giving a friend's child a gift, and that gift should exclude people, and if I knew the other side gave a gift in a social context to his son, that I should go in some way file a recusal motion?

Q Mr. Gardner, you do know what an ex parte contact is?

A I'm sorry, sir?

Q Do you know what an ex parte contact is?

A Ex parte contract, I think I do.

Q Ex parte contact.

A Contact.

Q Yes.

A Yes, sir.

Q You understand --

A Sorry for the hearing.

Q You understand that's having contact with a judge who has a pending case with you outside the presence of other counsel. You understand that?

A I understand that that's --

Q Am I stating what that is accurately?

A For what purpose is the contact made with the judge?

Q Just -- Mr. Gardner, am I explaining an ex parte contact correctly?

A I don't know. You can explain any way you want and you can explain it to the panel. I don't know your explanation.

MR. TURLEY: Objection. I believe an ex parte contact has to be in the case. The Congressman is referring to an ex parte contact with a counsel, so I --

CHAIRMAN MC CASKILL: What is your objection?

MR. TURLEY: Object to the question. It's not accurate. He's asking the witness about whether he has an ex parte contact, and he says the contact with another counsel.

THE WITNESS: Contact.

CHAIRMAN MC CASKILL: The objection is overruled.

BY MR. SCHIFF:

Q Mr. Gardner --

CHAIRMAN MC CASKILL: I think,

Mr. Gardner, I know that you're a lawyer, and it would be really helpful if you would try to answer questions and not ask questions.

THE WITNESS: Thank you, ma'am, I will.

CHAIRMAN MC CASKILL: Okay?

THE WITNESS: I apologize again.

CHAIRMAN MC CASKILL: If you would try to do that, I think we can go more quickly.

BY MR. SCHIFF:

Q Mr. Gardner, you understand -- let me ask you, in your view of the ethics of legal practice, is it appropriate for you to speak with a judge about a pending case outside the presence of other counsel?

A It is wrong for counsel to ex parte conversation with a judge at any time about a case that they have without the other counsel there.

Q And so it would be improper for you, or anyone else in the Liljeberg case, worth hundreds of millions, to be talking privately with the judge about issues in the case, wouldn't it?

A Yes.

Q And one of the most significant parts of Judge Porteous's decision in that case, one of the most controversial parts, was a decision he made to

award the hospital back to the Liljebergs, wasn't it?

A Yes, sir.

Q That was a devastating decision for the Liljebergs, wasn't it?

A They -- he awarded the hospital back to the Liljebergs. It wasn't devastating to the Liljebergs.

Q Excuse me, yes. Devastating to Lifemark.

A Lifemark.

Q Devastating to Lifemark.

A I'm listening.

Q Do you recall -- well, didn't you testify that you may have talked privately with the judge during that case about --

A Also --

Q Please let me finish. Didn't you testify to the grand jury that you may have talked privately, may have talked privately, with the judge while the case was under submission about whether he should give the hospital back to Lifemark?

A On direct --

Q Liljeberg, excuse me.

A On direct I commented, we went back every day. I saw a "may have," but I corrected myself in

one of these many statements that everybody wants you to give, and I said Lenny Levenson was there, I remember Lenny being there, on an afternoon. And he says, I think it was chicken doo doo on what the Liljebergs had to take because of the mortgage not being reinscribed and the foreclosure occurring.

And I said you may not like that, your Honor, but it is legal, and it definitely was legal, that the foreclosure occurred.

But I told him the foreclosure was also legal, and he couldn't give the hospital back.

I advocated my client's position. Now, from --

Q Mr. Gardner, my question was actually very simple.

Let's pull up the grand jury testimony so we can see exactly what you said and you can see whether it was accurate or inaccurate. Page 54 of the grand jury, bottom of the page.

This is you testifying.

"I had some heated discussions with him," meaning the judge. "I had a heated discussion with him on the Liljeberg case, and I remember him getting upset at me. I think it was when the lawyers were there, it may have been when only he

and I were there.

"But I told him, I said, I think this is exactly what I said, big boy, I don't think -- care how big you think you are, but even a federal judge can't overturn, because I've done a lot of real estate, I represent the clerk of court in real estate actions, a judicial sale that has occurred in state court absent fraud and ill practices, and none have been shown. I think I said that to him at the trial, and I may have reiterated it at some other point in time to influence him."

That was your testimony, wasn't it?

A That's my testimony, sir. And I want to tell you that Lenny Levenson was present, and it was at one of the afternoon breaks, when he commented about it. And when I say "influence him," I didn't want him to get the idea that absent fraud or ill practices, that anyone had the legal authority to offset a judicial sale like that.

And if I am making a legal argument to a judge with the other side there, to try and persuade him, and the use of the word "influence," but I've never tried to influence Judge Porteous at any point in time, illegally, without the other side there.

We never talked about this case outside of

the courtroom and the pretrials. When I say "other people," we had other meetings at the nice table and chairs all federal judges have in their conference room where that same point was brought up again with other lawyers there and possibly Mr. Mole.

Q Mr. Gardner, you're not disputing this was your testimony in March of 2006, are you?

A Those are the -- those are the words, sir, but I'm explaining to you that I never --

Q Mr. Gardner, I'm just asking you if you dispute your testimony.

Do you think your memory in 2006, much closer to the time of these events, was better or do you think your memory years later in this proceeding is better?

A My memory hasn't changed, sir. I never had an ex parte conversation with Judge Porteous about the Liljeberg matter, you know. Because let me tell you what. Had I done that, the result may have been a lot different. And I told everyone at the beginning, I was not going to do that.

Q So when you said in the grand jury "it may have been when only he and I were there" --

A He and I were there in the back with Levenson, sir.

Q Mr. Gardner --

A For the third time.

Q Was that accurate when you said that?

A Well, it's --

Q Is that the best of your recollection at the time, that it may have been when only you and he were there?

A I never had an ex parte conversation without all parties involved with this case, sir.

Q And didn't you also state, "I may have reiterated that at some other point in time to influence him"? What did you mean by that, to influence him?

A I may have tried to make the point stronger, because the judge in one of the conferences we had after all these days, was not happy about the fact that he looked like someone put over on somebody. And I was explaining to the judge the legal significance of the inscription and mortgages and everything.

Mr. Levenson, Lenny Levenson, knew real estate law too. We've had many heated discussion, because Lenny and I were arguing about that in front of the judge about he's saying, look how underhanded this was. And I said Lenny, you know this is not

underhanded. We don't have to reinscribe that mortgage. There is no obligation. If the mortgage isn't there and a foreclosed creditor who stands $7.2 million judgment can foreclose, he can do that. That was the argument.

Read what you want --

Q In fact, Mr. Gardner, the point you made to the "big boy" that he couldn't take the hospital away, the point you made was correct, wasn't it? He really lacked -- he lacked the power to take the hospital away, didn't he?

A I believe it was correct then, now, and I think the Fifth Circuit agreed with me.

Q Let me ask you one last thing, Mr. Gardner.

A Please.

Q You were aware during the Liljeberg case, weren't you, that lawyers involved with that case were trying to provide benefits to the judge to influence his decision? You were aware of that, weren't you?

A No.

Q That was your belief at the time, wasn't it?

A No. I knew of no benefits that were done

by the other side to influence the judge.

Q You --

A And --

Q Mr. Gardner, you believe exactly that's what was happening, didn't you?

A No.

Q Please call up page 50 of the grand jury testimony. Let me read this for you. Question --

A Can you make it bigger over here so I can read it?

Q Yes, please blow up beginning with "were you aware."

"Were you aware of any payments made to Porteous or on behalf of Porteous related to that litigation," referring to the Liljeberg case.

"Answer: By whom?

"Question: By anyone.

"Answer: Not by me, if that's the question. If the question is did I pay or give anything in connection with that litigation to Judge Porteous, the answer is no.

"Question: Are you aware of anybody else?

"Answer: No.

"Question: Having done so? Are you aware of anybody providing benefits to members of his

family?

"Answer: I don't know what kind of benefits, you know. Some benefits were provided. I just don't know what kind.

"Question: Well, let's break that down. What do you have? What are you talking about when you say some benefits were provided?

"Answer: I don't know. I don't know what I'm talking about. I don't know. I -- I just have a feeling, to answer your question honestly, I figure there are other people who have provided benefits or at least tried to, you know, buy him a drink, buy him a whatever or give him something. I don't know, I -- I don't -- I was never there when any of that occurred. I just think that probably other people who were trying to influence Judge Porteous."

Was that your testimony in the grand jury?

A That's what the words say.

MR. SCHIFF: No further questions.

MR. TURLEY: Madam Chair, we have a brief redirect.

REDIRECT EXAMINATION

BY MR. SCHWARTZ:

Q Mr. Gardner, let me just ask a few

questions just to make sure we understand your testimony.

What role did Mr. Levenson play in the Liljeberg case?

A He was lead counsel for Liljeberg.

Q So he was on the other side?

A He was.

Q When you and he had a conversation in front of the judge, that was not an ex parte communication; is that correct?

A We had many conversations in front of the judge with different parties. There were six, seven lawyers on Liljeberg's side, three, four, five on Mole's side. And different lawyers would interface with the judge at different times. We may have had some with all attorneys present in the conference room to kick off rules and stuff like that to begin the case.

But there were constant meetings, because there was -- the issues in this thing were so diverse. I think Mr. Mole, who is an excellent, who really had his hand on this case, knew about it.

But it was multifaceted litigation. Very interesting litigation, too.

MR. SCHWARTZ: Thank you. No other

questions.

CHAIRMAN MC CASKILL: Does the panel have any questions?

Senator Udall.

EXAMINATION

BY SENATOR UDALL:

Q Mr. Gardner, could you explain to me a little bit about this fee that you got, $100,000, I understand, as a result. You were in, and you were counsel for Lifemark; is that correct?

A Yes, sir.

Q And you got $100,000 as a result of that?

A Yes, sir. A flat fee.

Q Yeah. And then you gave $30,000, I think your testimony is, to this --

A Tom Wilkinson, yes, sir.

Q Who is a county official?

A He's a lawyer. He had a civil practice, and he worked for the county, yes, sir.

Q He was doing both things?

A Yes, sir.

Q How did it come about that you got the agreement reached that you were, when you got your payment, you were going to give him back, I guess as a finder's fee or something, $30,000?

A Not a finder's fee.

Q Tell me how it happened.

A Tom and I had a lot of cases together. We had some personal injury cases together, we had some criminal cases together, his office was doing DWIs and other white collar misdemeanors. And he would send me domestic cases and I would work on those. We would go meet with the client and he'd give me a referral fee, I would give him a referral fee.

Tom asked for the referral fee based upon the fact that he interfaced with the client and actually created the client, in terms of he and I working on it.

Although I want to make it crystal clear that Mr. Wilkinson's participation was minimal. When I say "minimal," he'd talk with me about it on a regular basis, asked me how it was going, and I told him what was going on in the trial and stuff.

But as far as taking part in the trial, he did not.

Q At what point did the discussion come about that you were going to get -- you were going to give him back the $30,000 of the $100,000?

A Tom set that number and asked for that.

Q Set that number at the beginning? At what

point?

A Very beginning. I think after I had been retained. And I don't -- I don't have those records. Katrina has taken so much from so many of us in Louisiana. I wish I could go back and see that. I tried to do that, but --

Q But you don't have any memory of how the discussion occurred and when -- when it was decided? Did he come to you and say, you know, you should get in on this, because you're going to get $100,000, but I want to have 30,000 back as a result of that?

A Senator, to be perfectly honest with you, I don't know if the discussion came at the time I was retained, shortly thereafter or thereafter. But it occurred at one of those points in times that Mr. Wilkinson asked for a portion of the fee.

Q You say it wasn't a finder's fee. What was it?

A Well, we had a relationship, Senator. Our offices worked closely on a lot of cases. Tom and I split fees on different cases, he'd refer cases to me, I'd refer cases to him.

We had an ongoing working relationship. This wasn't a one-time thing, where Tom picks up the phone and says, I'm going to send you a client, you

need to send me money.

We've got a working relationship on fees and cases. This wasn't the first case that his office and my office had ever worked on.

Not only did I work with Tom, he had a number of lawyers in his office, I worked with them too. They sent me cases they didn't handle. I participated, sent them cases, worked them with them, they worked some with me.

So we had an ongoing working relationship of cases long before Liljeberg came along.

Q Do you have any knowledge that Mr. Wilkinson got any money from Lifemark or any of the Lifemark attorneys?

A I do not, sir. I have no information to that effect, nor has anyone ever told me anything about that.

I do know he talked -- he was very close to Mr. Mole along this way.

Q Just one other area I wanted to ask about. As you probably know, Mr. Amato and Mr. Creely have surrendered their legal licenses.

A Correct.

Q And I assume that they felt that they had done something wrong as a result of that; right?

A Don't know that.

Q You don't know that?

A I know they have surrendered their licenses.

Q And have you -- do you still have your law license?

A I still have my law license.

Q And have you been investigated by the state bar association?

A Only thing the state bar association did, when they saw my name in the Times-Picayune, they sent letters out to everybody in the Times-Picayune. The Times-Picayune said get Porteous and everybody who has ever known him, to the second and third generation.

Q And you're in good standing now and not under --

A As of now I am in good standing. I believe that everything that I have done, including money given to Tom Porteous over the years, and I calculate that, nobody wants to bring that out, at about a couple thousand dollars over 20-something years. Because $100 -- I calculate about $100 a year.

Judge Porteous didn't ask me every day of

his life to give him money. We were out on an occasion, and he'd say you got a few extra dollars. I'm guessing that, and at one point in time, the grand jury testimony says, well, could be 3000, and I said far less than that.

But if I calculate, I at least gave him $100 for 20 years, I know it's $2000, give or take.

But I don't see that as an ethical problem in a friend giving money, loaning money, without the expectation of recovery.

I gave some bum in front of the Red Top Motel last night $2. Very poor hotel, by the way.

Q I just want to ask two more questions here. You're in good standing with the Louisiana State Bar right now?

A I am in good standing with the Louisiana State Bar. But believe me --

Q And that's fine. There's no question there.

A Believe me, there will ultimately -- I will answer the same questions to the bar association after you -- the Senate panel and Senate votes. I'm sure there are going to be additional questions.

Q Are you under investigation today by the

Louisiana Bar Association?

A There is a file open, Senator, and a letter has been written. And that's where it's at right now. I'm sure that the bar association is waiting for all of this to come, and I will be asked to make a statement as to my participation in Liljeberg, my participation with Judge Porteous, our friendship, gifts, any of those things.

Q So there is an open investigation now, is your understanding?

A Well, when you say "open" -- I received a letter in 2008, one letter so far. And I've retained counsel, and she wrote a multipage letter back saying that she believes that everything that I have done, in part of that inquiry, was legal under the ethical and codal articles in the State of Louisiana.

SENATOR UDALL: Thank you, Mr. Gardner.

THE WITNESS: Thank you, Senator.

CHAIRMAN MC CASKILL: Senator Kaufman.

EXAMINATION

BY SENATOR KAUFMAN:

Q Just to get an idea of kind of the Gretna mentality. You said you just gave a few thousand dollars to Judge Porteous. What would you say if

you knew that Amato & Creely gave him $20,000 over 10 years?

A I heard that only through here. I want to make it crystal clear that I don't know that.

Q I was just trying to get, what would you think about that? You made the point to say I've only given a couple thousand. Would that concern you?

A My couple thousand?

Q No, no, the 20,000. If you knew that two attorneys in town had given him $20,000 over a period of 10 years, would that concern you, a sitting judge, that they were doing -- that they were appearing before?

A That they were trying to influence the judge through money?

Q Yeah.

A That would concern me in any case I was involved in, friend or no friend.

Q I'm just trying to get a flavor of the idea. You gave him a couple thousand dollars. $20,000, that would be a serious amount of money to be given to --

A It's a serious amount of money.

Q Let me ask you another question. As you

said, during the Liljeberg case --

A Liljeberg.

Q Liljeberg case. Would you have been concerned if you knew that Amato & Creely had given him $2000?

A It would have raised my curiosity. That would have given me some concern. I would have, of course, wanted to know what was that about, was it done to influence the judge or whatever. But again --

Q So in other words, the fact just that they gave him $2000 would not concern you until you found out what the money was for?

A As the -- as Judge Jones said, I had a duty to inquire. And I would have inquired as to what the $2000 was about.

Q No, I'm just asking in terms of you're in -- by now he's a federal judge in New Orleans. There's been a lot about kind of the Gretna mentality. I'm just trying to get straight, in the Gretna mentality, if you were on the one side of the case, if you knew someone on the other side had given the judge in the case $2000, would you be concerned about that or would you just have to find out what it was about before you were concerned?

A I would be concerned and I would make an inquiry, if I thought on behalf of my client that that was in any way, shape or form done to influence the judge or done to obtain some advantage for their client.

Q So just the fact that he got $2000, you would need some more information? You don't think it's improper for someone to give a judge in a case they are involved in, as an attorney, $2000? For any reason?

A For any reason?

Q Yeah.

A I'd still be concerned for any reason, and I'd still make an inquiry.

SENATOR KAUFMAN: Thank you very much.

CHAIRMAN MC CASKILL: Senator Risch?

EXAMINATION

BY SENATOR RISCH:

Q You know, I don't think I'm going to get an answer to this, but I'm going to try.

CHAIRMAN MC CASKILL: You'll get an answer.

(Laughter.)

BY SENATOR RISCH:

Q Senator Udall asked you about the $30,000

and asked you what it was for. I listened here for about a minute and a half while you explained about all the other cases that you had with the gentleman, but you never said what the $30,000 was for. Do you want to try it again, briefly?

A The $30,000 to Mr. Wilkinson in connection with the case -- he started talking with Mr. Mole. I guess -- I want everybody to remember now, like I said, January of '97, late -- last week in January, as I remember, I think one of my calendars said I got a call from Tom or Mole about that time, and they didn't sign me on until March.

Again, I was reluctant to take it. But Mr. Wilkinson had indicated that, because of our relationship of sharing fees and working cases together, he asked for $30,000 on that case. Yes, sir. And I gave it to him. I'm not denying that.

Q And what was it for?

A Fees on a case that we were sharing. We shared fees on cases.

I didn't -- I didn't initiate that case. Mole didn't talk to me. Mole only sent stuff to Wilkinson. He was working on Mr. Wilkinson to try and get me to sign on to that case.

VICE CHAIRMAN HATCH: Mr. Gardner, you

called it a referral fee if I recall your testimony correctly.

THE WITNESS: Well, referral fee would indicate that I didn't have any relationship with him, Senator Hatch.

EXAMINATION

BY VICE CHAIRMAN HATCH:

Q That he referred the case to you and --

A He referred the case to me, and we had an ongoing relationship where cases were referred back and forth, not just between Tom and me, but between Tom's lawyers in his office and my office.

Q I don't see anything wrong with the referral fee. It just does seem strange, I have to admit, in this context. But you have a right to make a referral fee to somebody who -- seems to me, somebody who has referred a case to you.

EXAMINATION

BY SENATOR RISCH:

Q Is that what it was, referral fee?

A I wouldn't classify it as a referral fee. I would classify it as the ongoing relationship. Because, you know, I agree with Senator Hatch that referral fees are not illegal. But the code calls for it to have some type of relationship, which I

have with Mr. Wilkinson.

You can't just send me a case and do absolutely nothing on the case and me not having a relationship with you and you want a big payday.

If you and I are lawyers and you're sending me cases and I'm sending you cases, and we have a relationship, it would even out over time because on some cases, I may get a bigger portion for a small amount of work or vice versa.

But a referral fee in strict, just saying send me a case and I'll send you the money, that's not the relationship I had. And I don't want anybody to leave here thinking that, oh, Mr. Wilkinson calls up for a big payday.

We had an ongoing working relationship where clients went back and forth. We got cases. We shared them. He was a friend of mine who we did that for years and years.

SENATOR RISCH: Madam Chairman, he wins. I have no further questions.

CHAIRMAN MC CASKILL: Okay. Does anyone else have a question?

EXAMINATION

BY SENATOR WHITEHOUSE:

Q Just to be clear, Mr. Wilkinson was not

co-counsel in the Lifemark versus Liljeberg matter. He had no standing in that case; correct?

A He was not, Senator.

SENATOR WHITEHOUSE: No further questions.

EXAMINATION

BY CHAIRMAN MC CASKILL:

Q And it is correct, Mr. Gardner, that you went to Las Vegas on the bachelor party trip; correct?

A Yes, ma'am.

Q And you helped pay for that trip; correct?

A No, ma'am.

Q You didn't pay anything for the trip?

A No, ma'am. If they had had any of that along the way, they certainly would have asked me about that. I paid for my own way. I bunked with a gentleman by the name of John Gardner, a friend of Judge Porteous's and I, and it's 52, 62 hours on the ground. I spent most of the time, we went -- John and I went to a couple shows. He didn't gamble, I didn't gamble. We went out and had a couple fine meals and looked at some of the architect back in 1999 that was going up there.

And I want to assure everybody here, since the question wasn't asked because I think it's

important, that there was no discussion at any point in time about cases. I can assure everyone, that was the last thing on everybody's mind. Everybody was up there to celebrate the young man's upcoming wedding and I guess to have a good time.

CHAIRMAN MC CASKILL: Okay. You are excused.

THE WITNESS: Thank you very much.

(Witness excused.)

MR. TURLEY: The Defense calls Professor Ciolino.

Whereupon,

DANE CIOLINO

was called as a witness and, having first been duly sworn, was examined and testified as follows:

MR. TURLEY: Thank you, Madam Chair.

DIRECT EXAMINATION

BY MR. TURLEY:

Q Welcome, Professor. Thank you for your patience. I know you've been here all day.

At the suggestion of Vice Chair Hatch, I've been speaking with Mr. Baron about just stipulating and doing away with the credentials. Mr. Baron wasn't quite as familiar with the resume yet, so he's agreed as to stipulate as to legal

ethics, and then we'll see how the questions go. I've asked for a stipulation on both legal and judicial, but he wants to look at the CV a little more. And I've got no objection.

What I suggest is we go forward and if there's an objection to some of the questions, we'll just have to resolve it. I can always qualify him for judicial if we stop.

CHAIRMAN MC CASKILL: That's fine. And let me -- I forgot to give you your time before beginning this witness. Judge Porteous has eight hours and 19 minutes remaining, and the House has six hours and 57 minutes remaining.

MR. TURLEY: Thank you, Madam Chair.

BY MR. TURLEY:

Q Just for the record, would you be kind enough to state your full name.

A Dane Ciolino.

Q Just for purposes of introduction, as you can see we have at least a partial stipulation on your expert status, could you just describe what your current position is and a brief description of your background?

A My current position is the Alvin R. Christovich distinguished professor of law at Loyola

University law school in New Orleans. Prior to teaching full-time, I graduated from Tulane law school in 1988, worked as a law clerk in U.S. District Court in New Orleans, a couple of years at Cravath, Swaine in New York, four years at Stone Pigman as commercial litigator essentially. And since 1995 I've been a full-time professor of law at Loyola, where I am today.

Q Thank you very much.

You do teach legal ethics there?

A I do.

Q I'd like to cut to the chase. One of the things Vice Chair Hatch suggested was we use leading questions so we don't keep people unnecessarily over. I know you're eager to depart with your wife so I'm sure you'll appreciate that.

Let me first ask you just generally whether you are familiar with the 24th Judicial District.

A I am.

Q Is that the judicial district for Gretna, Louisiana?

A For Jefferson Parish, and Gretna is a city in Jefferson Parish, yes.

Q And you've had experience as an academic

looking at some of the controversies in Gretna, Louisiana, regarding ethics, have you not?

A Some, yeah. The -- there have obviously been a number of investigations into the judiciary over there and into some members of the bar, and I have commented on that and been involved in some of that, yes.

Q And you are familiar generally with the allegations with regard to Judge Porteous?

A I am.

Q I'm going to be asking you some general questions about the relationship of lawyers and judges specifically as to Louisiana ethics. And your specialty, correct me if I'm wrong, is in the state of Louisiana code of ethics as opposed to the federal code?

A Correct, Louisiana Rules of Professional Conduct and standards governing lawyers and also the Louisiana Code of Judicial Conduct and the standards governing Louisiana state judges.

Q Those are the two primary sources for these types of ethical questions or lawyers and judges?

A Yes.

Q Thank you, sir. Now, in your experience

in looking at these controversies, does that include as an academic reading some of the materials in this case related to the Porteous case?

A Yes.

Q And have you read material related to the Wrinkled Robe investigation?

A Yes, a great deal of it.

Q Okay. And have you been to Gretna, Louisiana?

A Yeah. I mean, it's right across the river from New Orleans. It's not very far away.

Q As you are probably aware, some of the allegations in these controversies involve judges having lunch with attorneys. Are you familiar with those?

A Those controversies in this matter, yes, absolutely.

Q Now, the ethics rules in Louisiana have gradually changed over the years?

A Which ethics rules are you talking about, the ones that govern lawyer conduct or the ones that govern judge conduct?

Q Let's start with the judge conduct and we'll have to -- how do you want -- do you want me to qualify him right now or --

MR. BARON: Why don't we do that.

BY MR. TURLEY:

Q I'm afraid we're not going to save that time after all. I'm going to go ahead and qualify you. We've already agreed you're an expert on legal ethics.

Can you state what your educational background is?

A I got a law degree from Tulane in 1988.

Q And you mentioned that you taught legal ethics, you teach legal ethics at Tulane?

A At Loyola, and I have also taught at Tulane as well. And I teach the bar review, ethics portion of the bar review, which includes legal and judicial ethics to students in Louisiana and elsewhere.

Q Did your course at Tulane also include judicial ethics components?

A At Tulane and Loyola, yes, there's a legal component to that course.

MR. BARON: I'll stipulate to the expertise.

MR. TURLEY: Thank you very much, Mr. Baron.

BY MR. TURLEY:

Q I'm going to turn to that question about is it accurate to call it judicial code?

A Code of judicial conduct is what it's called, Louisiana Code of Judicial Conduct.

Q Okay. The code of judicial conduct in Louisiana, has that changed over the years? Is it regularly amended or changed?

A I don't know about regularly, but it has changed over the years, and it's changed significantly just in the last two or three years on some of the issues that are relevant to this matter.

Q Now, the period of time relevant to this matter largely coincides with the judge's period as a state judge. And that period, I will represent to you, is 1984 to 1994. And then he became a federal judge.

A Right.

Q Are you familiar with the rules during that period?

A Yes.

Q Now, in 1984, was there a specific rule barring judges from having lunches purchased for them or paid for by attorneys?

A No, there was no per se rule that barred that practice outright, no.

Q And your use of "per se" I think is an interesting one. Because isn't it true that you're known as something of an ethics reform, that you believe in per se rules that are clear and bright?

A Well, I mean, I think anyone who teaches in ethics and practices in the area wants clear rules so that everyone understands what the standards are, so that people can comply with them and enforcement actions, we know whether or not a violation has happened. So yeah, I mean, when it's possible, I think everybody would prefer some per se clear black letter standard rather than some rule of reason that's more difficult to -- or totality of the circumstances, evaluation, where it's difficult to figure out what the edges are.

Q In your case, though, is it true to say that you have publicly advocated for tightening the ethics rules in Louisiana?

A I think that's fair, yeah.

Q And that you have been critical of the past rules that allow gifts to be given to judges, for example?

A I think I have been and I think other people have been, including the current Louisiana Supreme Court.

Q Thank you.

A Current Louisiana Supreme Court has changed those rules because of a lot of concerns in that regard.

Q Well, I thought it would be useful for the committee to understand how the rules have changed. Your use of "per se rules" sort of makes it an easy comparison.

Would you say that the rules today are what you would call a type of per se rule, one of those clear, bright line rules?

A Yeah. I mean, effective January 1 of 2009, judges cannot accept gifts and lawyers and other people cannot give gifts to judges if it's -- they're likely to come before the court. And there are certain exceptions that are enumerated, but since that rule, the new default rule is you can't give the judge a gift, and the judge can't accept a gift, if you're likely to appear before the judge either as a litigant or as a lawyer.

And then the rule goes on and lists a number of exceptions where the gifts are appropriate. And that, to me, provides lawyers and judges with a lot more guidance as to what's appropriate.

And the starting point is no gift is appropriate, unless it fits into one of these categories.

Q And that's what makes it this type of per se rule that you described?

A Correct.

Q And you were a public advocate for passing that rule, were you not?

A I believe I was, yes.

Q I'd like to bring up one of those rules that relates to what I just asked you about, which is lunches being purchased for judges by lawyers.

MR TURLEY: And this is going to be part of a larger package of exhibits, Madam Chair, that we are going to be moving in. We're going to pull it up and get the exhibit numbers, Madam Chair, and we'll move them in together, if that's okay with the Chair.

For the benefit of counsel and the committee, these are basically just the rules that go from 1984, '94 and 2009. The reason we're putting them in the record is that sometimes we thought it would be convenient for the record because they're sometimes hard to find. And their exhibit numbers are 1001(y), 1001(j), 1001(a),

1002(y) and 1002(j).

MR. SCHIFF: Madam Chair, if these are published rules, we have no objection. It seems similar to the kind of senatorial notice that can be taken.

CHAIRMAN MC CASKILL: We will take notice of any published rules that you wish to admit into evidence. All of these are published rules; correct?

MR. TURLEY: They are available. We were going to put it in the record for ease of the committee, but that's fine. They are available. I believe --

CHAIRMAN MC CASKILL: When I say they're published rules, these are rules that are printed by an authority to give out to lawyers and judges in Louisiana?

MR. TURLEY: Yes, they are just not readily available. They're available in hard copy. We're not sure they're available on the Internet. But --

CHAIRMAN MC CASKILL: That's fine. When I say published, I don't mean that we can go on a shelf and get a book.

MR. TURLEY: I understand.

CHAIRMAN MC CASKILL: I mean they emanate from an authority concerning the rules of conduct for the lawyers and judges in Louisiana.

MR. TURLEY: Of course. These are all the code of judicial conduct for --

CHAIRMAN MC CASKILL: Absolutely, they will go into the record.

(Porteous Exhibits 1001(y), 1001(j), 1001(a), 1002(y) and 1002(j) received.)

MR. TURLEY: Thank you very much.

BY MR. TURLEY:

Q Professor Ciolino, I'm bringing up part of Canon 6, which is Canon 6(b)(3)(c). You're nodding. I guess you must know that fairly well?

A Yes.

Q And I'm going to highlight some of the language in (c), and I'm going to -- I'm going to read this rule to you to make sure that this is your understanding of the rule today.

"Ordinary social hospitality provided the total value of food, drink or refreshment given to a judge at a single event shall not exceed $50."

Do you recognize that language?

A I do.

Q Is that one of those per se rules you were

talking about?

A It is. This one became effective January 1, 2009. It was first adopted by the Louisiana Supreme Court, I guess, March or so of 2008. And then tweaked a bit later in the year, and then that's the current version of the rule.

Q And so correct me if I'm wrong, does this rule then say that you can buy a lunch or a meal for a judge, so long as it's below $50?

A More or less, yes.

Q Okay. I'm going to read -- I'm going to read on in that, because there's a special provision about the calculation of large meals with multiple persons.

It says "the value of the food, drink, refreshment provided to the judge shall be determined by dividing the total cost of food, drink and refreshment," providing at the -- provided at the event by the total number of persons invited."

Are you familiar with that calculation?

A Absolutely. I mean, it's a very detailed way of making sure nobody can game the system and try to get the judge some extra money or food and drink. So it's -- it's fairly -- I mean, it applies to Christmas parties and to -- and to lunches and

dinners with judges. So it's -- it's fairly straightforward now.

Q So first of all, let me just take a step back to get a sense of continuity for the committee. This is the current rule. Back at that beginning of the period I mentioned to you, 1984, did this rule exist at that time?

A This rule did not.

Q And what rule existed at that time with regard to buying meals for judges, if you were a lawyer?

A The rule at that time was the judge could not accept, and a lawyer could not give, a gift if it reasonably might appear to affect the judge's official conduct essentially.

So it was a totality of the circumstances type test where you would have to look at all the circumstances surrounding the gift and then make a determination whether or not this particular gift is one that might reasonably be viewed as one that would affect the judge's official conduct essentially.

Q So at that time there was no per se rule on the value of the meal; it was this more -- I don't know how -- this general rule that you

described?

A Yeah. I mean, it's -- it's akin to the appearance of impropriety standard that has long been in the code, where you look at it from the standpoint of some unidentified hypothetical observer and evaluate whether that unidentified hypothetical observer, looking at the gift, would make the determination that this gift is one that appears to be designed to influence the judge in his behavior.

Q Thank you. You mentioned that this standard is a lot like the appearance of impropriety. Just to educate the committee, you are actually a past critic of the appearance-of-impropriety standard, are you not?

A Well, it certainly means well. But it's a standard that really isn't much of a standard at all. Because it essentially tells, I guess, regulators, the Supreme Court in regulating judges, that they shouldn't do something that appears bad.

Well, what appears bad is anything that appears improper. So it's a standard that has been taken out of the lawyer codes and most of the kind of lexicon of lawyer ethics. It still appears in the judicial code, but you rarely see, in

particularly Louisiana, stand-alone judicial ethics enforcement actions, essentially, disciplinary matters before the judiciary commission, based only on that. That's usually kind of a tag-on with more specific violations.

Q Now, you said something interesting. You said that you see this that this particular language used to be in a lot of codes for lawyers, but has been gradually removed? Was that what you said?

A Well, I mean, it was in -- long ago it was in lawyer codes, and you still see judges use it every now and again. But most people agree that it is not a standard that really is one that is -- is useful in sorting out, you know, the sheeps and the goats, the good conduct and the bad conduct, because it's all about appearances.

Well, appearances to whom is kind of one of the reasons why it's a problem. And the old standard governing gifts was essentially akin to that. You ask whether this gift would appear to be one designed to influence.

And again, that is going to turn on -- the resolution of that is going to turn on who the observer is and then the totality of the circumstances surrounding the gift.

Q Professor, you said this will often turn on the whom. But can it also turn on the where?

I mean, if you say that there is an appearance-of-impropriety standard in one of these codes, can't that appearance change from place to place, that is, what has an appearance of impropriety over here maybe in this small town may be different from what appears to be improper over here in a larger town or in a town in a different place?

A Yeah. And to different people in different -- you know, in that same town. A lot of this conduct to me appears grossly inappropriate. But perhaps to others it doesn't.

Q And, in fact, is it correct to say that you've spent much of your career saying there should be no gifts, no lunches, we should just have the brightest of lines; is that correct?

A Well, I don't know about much of my career doing that, but that's certainly something that I've said over and over again to anybody who would listen.

But the -- you know, just judging that conduct by what looks bad, what looks bad to me might not be what looks bad to other people. That's

the problem.

Q Could you be described as something of a purist in that sense?

A Well, I mean, it depends. But I think, you know, a lot of the gifts that I've seen and that we've all seen in Louisiana I think are -- are inappropriate. I mean, these law firms deliver the hams and the whiskey and the wine to the judges at Christmas, and they don't give me any of that stuff.

Well, it strikes me as the only reason they're giving it is because they want the judges to be friendly to them in return. And that, to me, stinks.

Q It's not you; it's who they are that bothers you?

A But at this point, a lot of that conduct has stopped since the adoption of these new per se rules. And it didn't exist -- I mean, that conduct was fairly prevalent back prior to the existence of this. And I think we've seen a lot of change -- a lot of positive change since the adoption of these new rules.

Q So back in 1984, you stated that there was no bright line on the value of a meal that you have today.

A Right.

Q Were lunches more common back then in places like Gretna, in your experience?

A Well, I wasn't a lawyer in 1984. I mean, I was a --

Q I'm sorry, but in terms of your academic work, I should say.

A Well, I guess going all the way back in the late '80s and through the '90s and the early 2000s, I think it was -- I'm certain it was very common to have lawyers and judges going to lunches, hunting trips, fishing trips, those sorts of events, without the judges paying. That was just -- there was nothing uncommon at all about that.

Now, I personally think that that's inappropriate.

Q Sure.

A But at the time, I wasn't regulating lawyers and I wasn't the observer, you know, who was making the decision whether or not that that was improper.

Q And so I want to -- I want to comb out a little bit some of that information. You said that -- you mentioned fishing trips, I think you mentioned hunting trips.

Does that get back to that difference between whom and where, when for example, in some areas, the "where" has a lot -- that fishing and hunting is very, very common, so those areas it might be less of an appearance of impropriety to go on those types of things than in other places, where it's less common?

A It may be. Obviously, if there's a consensus that something appears to be improper, then that conduct is not going to happen -- it's going to happen behind closed doors and in the dark at night.

But that sort of conduct was happening at midday at Galatoire's. It was there for everyone to see, and no one, no judges were being prosecuted in the judiciary commission process for those lunches and those outings, and no lawyers were being disciplined for it.

Q Would you call that a sort of custom of the area, that there's sort of a customary practice that evolves in this sense?

A That's just the way things were. Now, I can say somewhat proudly for the judiciary that these new rules have had a marked effect on this, on that sort of conduct, and things are markedly

different today.

Q It changed customary practice?

A Well, now those kinds of gifts are per se unethical. You can't do it. And if you do it, you know you're going to get sanctioned for it. So it doesn't -- it doesn't happen. I mean, judges are worried and lawyers are worried about this $50 limit. Law firms have consulted with me about whether they can have judges to the Christmas parties. And it's all about whether or not the Christmas party is going to cost more than $50 a person.

So the law firms have told the judges that Ciolino says you can't come to the Christmas party.

Q That must be an awkward position during the holidays for you.

Let me ask you this about how that rule changed the custom. Is it your -- have you seen a marked difference that, in terms of what people considered to be an appearance of impropriety, that the rules change, that they change people's attitudes of what was improper?

A Well, more importantly, you don't have to ask the question, does it appear improper. You have to ask the question whether or not it complies with

the black letter of the rule.

Q I see. So there's no -- this is actually part of the value of this rule, is that you really don't have to rely on the fluid concept of an appearance of impropriety; the rule says what it says?

A And that's the benefit of a per se rule.

Q Let me ask you just to fill out this rule, to understand how it is done mechanically. You mentioned that this applies even to holiday parties and things like that, where there's lots of people.

How do you -- so let's say we have -- if I invite 10 people to lunch at Galatoire's, assuming I could afford that, and in order for me to comply, if they're all judges, and in order for my guests to confirm that they comply, how would I calculate this under the ethical rule, if I have a check and 10 guests?

A Well, the rule tells you how to do it. You count the number of heads and you divide by the total cost. If a judge is there, it's got to be $49 or less.

Q So in this case, if I got a check at Galatoire's for $100 for dinner, which would be itself a miracle, I used to live in New Orleans, but

let's say I got a $100 check from Galatoire's for 10 judges, I would quickly calculate and say okay, each judge got $10, so I'm below that bright line rule of yours; correct?

A Correct. Not mine. Louisiana Supreme Court's bright line rule.

Q I didn't mean to give you that much credit.

Let me show you a demonstrative that we have in this case. Mr. Meitl is putting up a demonstrative that we have shown the committee before. Now, I'll represent to you, Professor, that in this case the House of Representatives has located six receipts while Judge Porteous has been a federal judge that are related to the allegations in this case, that is meals in which he had meals paid for him.

Now, I'll mention that two of these receipts they believe they could charge against the judge because there is a reference to ABS, you see that, in that yellow, I don't know how good your eyes are.

A Yeah.

Q The Government has represented that that probably means Absoluts, and because the judge drank

Absoluts, then it probably indicated that he was the guest at that time.

But let's assume that's true, whoever was drinking the Absoluts had to be G. Thomas Porteous. We'll assume that for a second.

You'll see the dates of these receipts -- these are from a place called the Beef Connection in Gretna. You'll see the dates over on the left, and then there's the total bill.

Now, what the Government did is it put into evidence those total bill figures. So we went and took a look at how many people were at the meals, you see.

So it shows five, 10, 10, nine, eight, 14. These are pretty big meals, okay.

Now, we did what the rule you just described suggests. We took I guess you would call it a per capita or per-person share of the meal. And you will see the value of the meals on the end column here under per person share.

Do you see that?

A Yep.

Q Okay. Now, five of those six are below $50. Can you see that column?

A Yeah.

Q Now, is it true that those five meals fall below the line in the code provision you just described?

A Yes.

Q And so under the Code provision, at least from the information that you have here, those would be possible today as ethical meals; correct?

A Yes.

Q Okay. And the one that would not be possible, correct me if I'm wrong, is 8/6/97, because that one was $57 and that's --

A Yes, it's over the limit.

Q By how much?

A $7.

Q Yeah. So that's $7 over, so that would violate the current rule; correct?

A Yes.

Q But otherwise, the rest of them would be okay?

A Correct.

Q Now, Professor, can you tell us, you've already explained to us how you do this per capita calculation of meals. Can you also explain to the committee what the rule is in terms of individual meals? Is this $50 per day, or is it $50 per meal?

A It's per, quote, single event.

Q And the single event is usually a single meal, am I correct, like lunch or dinner?

A That's the way that I would read "single event."

Q So you can actually have more than one meal in a given day, even from the same lawyer, and it doesn't technically go beyond the $50 limit. You have to stay at a $50 per event or per meal that you described?

A That's what the rule says, yes.

Q Thank you. One of the curious things about the rules of the 1980s that you described is that it wasn't just a -- that there was no prohibition on lunches; right? There was -- was there a specific prohibition on gifts that, you know, per se that you couldn't receive a gift?

A There was just the general rule that says -- that at the time provided that a judge could not accept a gift if it would reasonably appear that the gift was made to influence the judge's official conduct. That was the rule.

Q And that's that rather fluid concept you mentioned before that --

A Yes.

Q -- you didn't particularly like?

A Correct.

Q Did you ever know any -- in your recollection and studies, have you ever known a judge who was prosecuted under that old rule for having lunches bought for him?

A No.

Q And have you ever known a case where a judge was, when I say "prosecuted," I should say "charged ethically," for having a gift under that standard, under the old rule?

A No.

Q And, indeed, as you described, you said that it was very, very common for law firms to give gifts to judges; correct?

A Right. The Christmas gifts, the lunches, the golf and hunting and fishing outings, that was not uncommon.

Q And in that sense, there was no distinction between gifts, so there's no distinction between a lunch, a flower basket, a bottle of bourbon or an oil change; correct? I mean, there was no definition of these types of gifts versus that type of gift?

A No.

Q Thank you.

A All gratuities were treated the same.

Q Professor, were you present when Mr. Don Gardner sat in that chair just now giving testimony?

A I was.

Q Did you hear him talk about giving Judge Porteous, I just wrote down two, I heard him say gin and sweaters, those are the ones that stuck out in my mind. There was a large list. Do you remember him talking about that?

A Yes.

Q Okay. Now, under the old rule in the 1980s, was there a per se rule that you could not give a judge gin?

A No.

Q And how about a sweater?

A No. As I've already said, there's no distinction between types of gratuities. All gratuities were treated the same.

Q Thank you. But I don't mean to understate this. There was still a rule there that was sort of a catch-all rule that was that more fluid rule you talked about, that you analogized sort of appearance of impropriety; right?

A You would look at the gift, who the giver

was, what the gift was, what the occasion of the gift was, and, based on the totality of the circumstances, make the determination whether or not this gift might reasonably appear to be given to influence the judge's official conduct. So things like the prior relationship of the judge and the giver would matter. The monetary amount of the gift. Everything. The totality of the circumstances would matter.

Q Well, Professor, you just said that in the totality of the circumstances, it would matter, for example, what the relationship is between the judge and the gift giver. So in the case of Mr. Gardner, I believe that Mr. Schiff, for example, showed him that he referred to himself as his closest friend in the world. Did you hear that testimony?

A I did.

Q So would that be relevant in determining whether a particular gift was improper under that old standard?

A Yeah, of course it would. I mean, I think -- gifts are all going to fall on some kind -- on a spectrum. At one end, kind of the bad end of the spectrum, you'd have the new car given to the judge by the litigant as soon as his case is

allotted to the judge. That would be obviously given to influence the judge in his official conduct.

At the other end of the spectrum would be the gift given to him by the old friend, the birthday card from the old friend, which obviously would be given as a friend.

Now, where other gifts fall in between, that's the problem with the rule, is that you were not given any guidance as to where along that continuum to place various different gifts.

Q That's very clear. And to be fair to you, I get the impression that you would put that line on that spectrum pretty much near zero, because you seem to be more of sort of a purist.

A Yeah, I would. I mean, because -- yes, for reasons I've already said, I would.

Q And then there's lots of people that obviously are at the other end of the spectrum, and that's part of that fluidity that you described; is that correct?

A That's fair, yes.

Q Now, I'd like to ask you about one type of allegation in this case that my colleagues from the House side have raised, and that's with regard to

curatorships. Do you know what a curatorship is?

A I do.

Q Can you give me just a general idea? Lawyers handle curatorships and they send out notices, correct, about property and --

A When a lawsuit has been filed and the defendant is absent, they can't find him for whatever reason and the plaintiff who has filed the lawsuit either needs a divorce from the missing spouse or needs to foreclose on some property, it might be a lender, a bank or something, and you can't find the other person, the defendant, the judge will appoint usually a lawyer to be the curator to accept service from the plaintiff, to run some ad, purely ministerial, really, run some ads, run an ad in the newspaper, then file a note of evidence telling the court what they have done.

Then once that note of evidence is filed, then the plaintiff can get their, essentially, default judgment against the absent -- the absent defendant.

Q Have you ever done curatorships?

A I've done some before, yes.

Q While you were a practicing attorney?

A Yes.

Q So you speak of them not as an academic but a practitioner. So they're not very tough, in other words?

A No, they're very simple, very ministerial.

Q And you get sort of a small fee, I can't remember --

A 2-, 3-, $400. I mean, certainly not anything more than that, but around a few hundred dollars.

Q Are you familiar with the allegations with regard to curatorships -- allegations with regard to curatorships in Gretna, that is judges giving curatorships to friends?

A Yes.

Q In fact, is that fairly big news in Louisiana, this whole curatorship controversy?

A No. I mean, most of the curatorships are given to friends of the judges, the campaign contributors for the judges. Sometimes some judges give them to younger lawyers who are just starting out to help them out. But usually you see them -- and again, there's less of this going on today. But traditionally, friends, campaign contributors and former law clerks sometimes. So that's -- that's typically the way that those curatorships have been

given out.

Again, I'm making a blanket statement because every judge decides who they want to give their curatorships to. And some care about it more than others.

So I mean, some of these generalizations really aren't fair. But that's -- there they are.

Q Well, isn't it true that it was a common practice for judges to give curatorships to friends in Gretna until certainly in the 1980s and '90s?

A Yeah. Not just Gretna, but Orleans Parish, and other parishes as well.

Q In fact, isn't it still the case that judges can give curatorships to friends and acquaintances?

A Yes, but they know people are watching. So the Times-Picayune has run a number of articles on curatorships, they have come up in this proceeding. So judges are much more concerned about who they give those curatorships to today than they were then.

Q So you think -- so is it true to say, then, that the attitude has changed as to the propriety of giving out curatorships to friends or --

A I think that's a fair statement, yes.

Q Is that fair? But back in the 1980s and 1990s, was it a fairly open practice?

A Well, curatorships were filed in the public record, yes. I mean, it's not any secret about giving a curatorship to someone or who gets the curatorship. It's all a matter of public record.

Q But did that violate legal or judicial ethics to give a friend a curatorship?

A No. I mean, assuming that there was no kickback given to the judge of the -- of the curatorship money.

Q Because a kickback or bribe would make it unlawful; correct?

A Absolutely. Not just unethical but unlawful.

Q Right. You wouldn't need an ethics charge?

A Right.

Q It would just be a straight crime, wouldn't it?

A Yes.

Q Okay. And just to make sure we cover the waterfront, do the -- I guess we'll start with the

current rules. Do the current rules distinguish between lawyers and nonlawyers in giving gifts to judges? I mean, is there a separate rule for one for lawyers and one for nonlawyers?

A No, one rule and the rule specifically mentions that applies to lawyers as well.

Q Okay. So --

A Lawyers as gift givers as well, yes.

Q Okay. So if I'm correct, if I'm at that dinner at Galatoire's and my son, Benjamin, buys the meal and he's 12, but he's definitely not a lawyer, he still would have to comply with that same rule of $50?

A Well, the judge would have to comply with the rule.

Q The judge, thanks for that correction, all right. Thank you very much. Now, since you were sitting here, you probably heard Mr. Gardner talk about a retainer agreement for -- it was with a man named Joe Mole. Did you hear that?

A I did.

Q Now, were you already familiar with that controversy involving the Mole retainer?

A I wasn't familiar with it until a couple of days ago when it came out during these

proceedings that that contract had been made. And I actually heard from a couple of people, asking me about that contract, whether that was ethical.

Q So these are people --

A Just lawyers.

Q That just called you out of the blue?

A Right.

Q So they had heard about it through these proceedings?

A Yes.

Q And they called you to just ask, can you do that? Is that what they were calling about?

A I had to ask, what are you talking about? And then I figured out what they were talking about. To me it seems not even a close call. I mean, it seems to be, to me, blatantly unethical.

Q Let me pull up an exhibit, Madam Chair, that's already in the record. And this is House Exhibit 35(b). And this is the retainer agreement.

I'm going to direct your attention to a couple of things in this letter. Have you seen this letter before -- I should say this retainer agreement?

A I saw it for the first time when you sent it to me.

Q Correct, thank you. First of all, I'll just highlight the name at the top. And it says, "Don C. Gardner, care of Thomas Wilkinson."

Do you see that?

A Yep.

Q Do you know who Thomas Wilkinson is?

A He was the parish attorney before -- of Jefferson Parish before he resigned.

Q Do you have any idea why he resigned?

A There were a lot of investigations going on into Jefferson Parish government, and his name came up in connection with those, and he resigned shortly after that.

Q What type of investigations are those?

A All sorts of public corruption investigations.

Q Let me go down to --

A I'm not suggesting that he -- I don't know what his involvement is in any of that.

Q You have no personal knowledge?

A All I'm doing is just telling you what the time line is. I'm not accusing him of anything.

Q Fair enough. And my question was just for that purpose.

A Right.

Q Thank you. If you look at paragraph number 1, if we could highlight that for the professor, it says, "retainer of $100,000 payable upon enrollment of counsel of record."

Can you see that on that little screen next to you?

A I can.

Q Can you tell us, what -- in your experience, what does it mean, "upon enrollment"? Are you familiar with that term?

A I understand what it means, yes.

Q What does it mean?

A Well, when he enrolls as counsel of record in the case, when the judge signs the order enrolling him as counsel of record in the case.

Q So you've served, correct, on disciplinary ethics committees?

A I have.

Q So if you saw a line like that in an ethics case, would you interpret that to mean you get $100,000 just by entering the case?

A Right. It's a fixed fee. I mean, there's nothing per se wrong with a fixed fee.

Q Fair enough.

A It seems high, but nothing per se wrong

with a fixed fee.

Q I'm going to direct your attention to the bottom of this document. There's a paragraph that begins "further Lifemark." I'll read it to you. You can follow along on that screen.

It says, "further, Lifemark will pay you $100,000 as a severance fee in the event that Judge Porteous withdraws or if the case settles prior to trial."

And then goes on to say, "this would result in a total of $200,000 (100,000 retainer plus 100,000)."

Do you see that?

A I do.

Q What do you take the meaning of that paragraph to be?

A Well, it seems to me that the -- and again, this is speculation from reading the language, but that they are getting Mr. Gardner involved in an effort to get Judge Porteous disqualified.

And that, to me, is blatantly -- if that's the purpose, is blatantly unethical, because we've had lawyers in the Eastern District and in Louisiana harshly sanctioned for manipulating the random

allotment system, where you're trying to judge shop. You might bring two petitions to the courthouse and file the first one and if you get the wrong judge, you file another one, and then dismiss the first one.

Well, we've had lawyers disciplined for that, because it is conduct prejudicial to the administration of justice in violation of Rule 8.4 of the rules.

To the extent that this is going on kind of after the fact, in an effort to manipulate who the judge is on the case through recusal rather than through allotment, it's essentially the same thing, if that's what the purpose of this was.

CHAIRMAN MC CASKILL: May I interrupt just for a second? Would you mind, Congressman Schiff, and Mr. Turley, would you approach the bench for a minute? We need to talk about our time and this witness. It's my understanding this witness can't be carried over?

MR. TURLEY: I was actually going to try to wrap up soon. I'll come over.

CHAIRMAN MC CASKILL: Stop the time.

(Discussion off the record.)

BY MR. TURLEY:

Q Professor, in fairness to the House counsel, I'm going to be stopping very soon so they have a chance to speak with you because we know you have to leave town.

I just want to direct your attention to two more things on the letter and then I'll let you go on. If you look at the second page of the letter it says on the very top, "as you explained it, the trial is continued beyond June because Judge Porteous withdraws or gives the case to a new judge, you will not be able to remain involved."

So if you had gotten a letter like this at one of your disciplinary committees, what would you interpret that line to mean? I mean, does it suggest that?

A Again, it's pure speculation, but it looks like they're just getting him involved because he's friends with Judge Porteous. And once Judge Porteous is off the case, then there's no need for him anymore. That's what it appears to me.

Q I'm going to quickly draw your attention down at line 1, and it gives that same language of calculation on the preceding page. It's the very first thing 200,000 if Judge Porteous withdraws, 100,000 plus 100,000.

A Okay.

Q At the bottom we're going to highlight the name of the person who wrote this contract, Joseph Mole.

Do you see that name?

A Yes.

Q Now, I'm going to ask you just one simple question. You had already sort of answered it. You said that this seemed blatantly unethical.

A If the purpose of it was to get Judge Porteous off of the case.

Q So as an expert in legal ethics, do you believe that Mr. Mole, in executing a retainer like this, is presumptively acting in a blatantly unethical way?

A I don't know about "presumptively." If the purpose of this letter was to judge shop after the fact, that's conduct prejudicial to the administration of justice, and without a doubt, at least in my mind, that would be improper.

Q That's similar to those -- you've analogized it to those cases that you talked about, two or so cases recently?

A Well, they weren't recent cases, but yes, that's -- I think it's similar, very similar.

VICE CHAIRMAN HATCH: Could I interrupt for a second? What if the purpose is to make sure, because friends are on the other side, to make sure that things are even and balanced? Is that a fair reason for hiring?

THE WITNESS: Yeah, and I think that's a fairly common occurrence.

VICE CHAIRMAN HATCH: I've seen that, many times.

THE WITNESS: Absolutely.

VICE CHAIRMAN HATCH: And knowing that they have got to balance, make sure there are friends on both sides, so it's got more chance of having the judge act appropriately.

THE WITNESS: Yeah. I mean, kind of a sad state of affairs, but I think that happens often.

VICE CHAIRMAN HATCH: Nothing unethical about that, is there?

THE WITNESS: No.

MR. TURLEY: Thank you for that clarification, Mr. Vice Chair.

I'm going to go ahead and pass the witness to my opposing counsel.

CHAIRMAN MC CASKILL: Thank you very much, Mr. Turley. I appreciate you being considerate in

that regard.

Cross-examination.

CROSS-EXAMINATION

BY MR. BARON:

Q Good afternoon, Professor Ciolino.

A Good afternoon.

Q Let's begin quickly with this chart. 1997, '97, '97, '98. This is 10, 12 years ago.

A Yes.

Q These numbers are 10, 12 years ago, by today's numbers, under the new rule, the $50 rule, every one of these would have gone above it?

A You very well may be right. The rule does build in adjustments for cost of living, so I guess you would have to work backwards to do those numbers somehow, yeah, that's fair.

Q Fair? Okay let's put ourselves in Gretna back in the mid to late -- mid to late, during the period when Judge Porteous was the -- on the state bench. Can we agree that if you have a judge giving close to 200 curatorships to a lawyer who is a good friend and they're worth about $200 apiece in fees, in return for a portion of the fee which is generated by the judge calling up and saying, hey, where is -- can I have some of that curator money,

so it might be termed reasonably, and one of the lawyers has termed it a kickback, did you need a per se rule even in Gretna to know that that was unethical and indeed criminal?

A Absolutely not. Kickbacks would clearly be criminal.

Q And if you have a judge in Gretna back in that era setting bonds, splitting bonds at the request of the bondsman, in order to maximize the financial benefit to the bondsman, in return for which the bondsman takes the judge to Las Vegas, pays for it, many expensive lunches, maintains his cars, fills it with gas, tires, radios, air conditioning, services them, and repairs, does home repairs, do you need a per se rule even in Gretna to know that is unethical and perhaps indeed illegal?

A No, not at all. I mean, if there's -- if there's a quid pro quo, if Judge Porteous is saying I will do this for you if you do this for me, then that's -- that's bribery, extortion, whatever you want to call it. It's a crime, and it's unethical. And unethical, right.

Q Okay. Sorry. And indeed, a couple of judges down in that part of the world have gone to jail for their -- in part, at least, because of this

kind of relationship with the Marcottes. Isn't that true? Bodenheimer?

A This kind of relationship? Judge Bodenheimer obviously went to jail for conspiracy involving himself and the Bodenheimer -- and the Marcottes, yes, absolutely.

Q How about Judge Green?

A Judge Green wasn't convicted of a count involving the Marcottes, I believe.

Q Okay. Well, I can't challenge that.

A Right.

Q But he was charged?

A He was charged with a lot of things, and I think he was convicted on a single count of mail fraud that didn't involve the Marcottes.

Q But if there was, as you termed it, a quid pro quo between the judge setting and splitting bonds as requested in order to maximize their profits, in return for which, the trips, lunches, et cetera, et cetera, do you have any doubt that even in Gretna, without any per se rule, it's wrong, it's unethical, it's criminal?

A Not any doubt whatsoever.

Q Even in the absence of a per se rule, and one can certainly see the advantages of that, in

Gretna, is there an issue of degree? In other words, is there a difference between taking a judge to lunch, you know, on an occasion, a birthday, some sort of celebration, maybe just you run into him maybe three times, four times a year, is that different from, even under the old rule, hundreds of lunches over the years paid for by the lawyer in which the judge, according to the testimony, paid for a couple of lunches throughout that time? Even in the absence of a per se rule, doesn't that raise serious questions about the relationship?

A I mean, that's the continuum that I talked about. It's all a matter of where those gifts or each particular gift fit on that continuum. The problem with an indeterminate standard like that, who is to say with regard to a particular gift where on the continuum it falls?

Q We've been talking about Gretna. To what extent are ethical standards, even in the absence of a per se rule, determined by venue?

A Excuse me?

Q By the venue.

A Well, as -- I mean, the Louisiana code of judicial conduct applies the same to every judicial district in the state. It doesn't apply differently

in Orleans Parish as it would in Jefferson Parish. It's the same black letter rule everywhere.

Q And even in the absence of a per se rule, you say you wouldn't do these things but others might, I wouldn't do it but others might?

A Yes, absolutely.

Q Is it determined by the lowest common denominator? Is that where the standard ends up?

A Well, that's the question. That's the problem with the standard. If -- who is looking at the conduct and who is making the determination?

If the conduct is being done openly, unabashedly and over a long period of time, you would think that if there was a community norm, if there was a standard that everyone agreed to, that was improper, this stuff wouldn't be going on in the open at high noon.

But -- and again, we're being very general, we're saying "this stuff."

Q Right.

A But a number of these practices. So that's -- again, we're trying to figure out where on the continuum this conduct falls, and because of the indeterminate standards, it's difficult to say where.

Q Well, but isn't --

A For me --

Q You don't have any trouble?

A No, I don't have any trouble.

Q And isn't it true lawyers, and especially judges, make judgments about what is acceptable, what they can do and what they can't do? You don't need a per se rule to say every act or activity. There's an ethical sense, a judgment. And at some point, your activity is so beyond what's acceptable, you don't need a per se rule, do you?

A At some point, whatever that point is.

Q And finally, with regard to Mr. Gardner, it would have been unethical, in your view, for Gardner to accept and sign up for that contract that you were discussing with Mr. Turley?

A Absolutely, if that was the purpose.

MR. SCHIFF: Excuse me one second. I'm done, thank you.

MR. TURLEY: Madam Chair, we have the world's shortest redirect, if I can beg your indulgence for just a second.

CHAIRMAN MC CASKILL: We like the terminology "world's shortest."

(Laughter.)

CHAIRMAN MC CASKILL: You got our attention.

MR. TURLEY: I'll make good on this, I promise.

REDIRECT EXAMINATION

BY MR. TURLEY:

Q Professor, would it make a difference in that totality of the circumstances that you described to know in addition to what Mr. Baron described as some of the facts in the case, to know that the Government has conceded that no bonds were set too high or too low for the Marcottes? Is that one of the things that would go into that totality test?

MR. SCHIFF: Madam Chair, we would object to the foundation for this question. That is not what we've represented.

MR. TURLEY: You've not -- you've not said that in your summary?

MR. SCHIFF: What we've said is that the bonds were set to maximize the profits of the company. Whether, in fact, by maximizing profits, they were set too high, that may very well be the case. We're not saying that that didn't happen. But we are saying that they were set for the purpose

of maximizing the profits.

They may very well have been set too high for purpose of maximizing the return of the bondsman.

MR. TURLEY: That's a valid point. I'll take that. Why don't I change the question for the witness.

CHAIRMAN MC CASKILL: I think you need to rephrase the question.

MR. TURLEY: Sure.

BY MR. TURLEY:

Q If the summary -- if the Government, and we can debate to what extent you've said this, if the Government conceded that bonds were set -- were not set too high or too low for the Marcottes, is that one of the factors that you would look at in that totality of the circumstances?

A If Judge Porteous did not do something for the Marcottes in exchange for them doing something for him --

Q No, no, I should clarify. My colleague, Mr. Baron, gave you a whole bunch of different allegations in the case. And I just wanted to ask that if one of the allegations -- if one of the factors in the case was a finding that bonds were

not set too high or too low by Judge Porteous, would that be one of those elements in your totality test?

A It might be. The problem with talking about elements in a totality test is you want to know all the circumstances.

Q Thank you.

A And then evaluate which of these factors should be given what weight. So I don't think I could fairly pull one out and talk about it. It's just not the way you do a totality analysis.

Q And Mr. Baron made a fair point when he pointed out that, you know, these are prices of meals a few years ago, and they may have gone up.

A Right.

Q And so today you would want to know what the -- what the current costs are at the Beef Connection; correct?

A Yeah. I have no idea about any of that.

Q We do. We actually went to the Beef Connection and got a menu.

MR. TURLEY: I'd like to enter the menu of the Beef Connection into the record. It is Porteous 1008, if there's no --

MR. SCHIFF: We have no objection.

CHAIRMAN MC CASKILL: We welcome the menu

of the Beef Connection.

(Porteous Exhibit 1008 received.)

(Laughter.)

MR. TURLEY: I'm told you get a free entree, but I'll leave that to the members.

Thank you very much, Madam Chair.

CHAIRMAN MC CASKILL: Senator Risch.

And we are going to try to wrap up the questions from the panel in 10 minutes or so, if possible. I don't want to hurry you. Everybody take whatever time you want.

SENATOR RISCH: I'll be relatively brief, Madam Chairman.

EXAMINATION

BY SENATOR RISCH:

Q Professor, I'm struck by your testimony that you've -- it's kind of -- and I don't mean this the way it sounds, but it's kind of antiseptic. You've talked about lunches and these kinds of things.

But let's talk about this case. You said you're from down there in Louisiana, you have followed these cases, you've looked at what's going on. Are you familiar with the allegations against Judge Porteous here?

A I am, yes.

Q Okay. And you understand, this is -- it is different in that you're kind of involved in the issues of ethics, and we're -- the Founding Fathers gave us a few words we've got to hang our hat on, which has been done I guess 10 times before and we're going to wind up having to weigh that in this case.

But let me just -- let me just walk you through briefly a couple or few of these. Article I that the judge has been impeached on by the House alleges that Judge Porteous appointed Amato's law partner as a curator in hundreds of cases and thereafter requested and accepted from Amato & Creely a portion of the curatorship fees which have been paid to the firm. During the period of this scheme, the fees received by Amato & Creely amounted to approximately $40,000, and the amounts paid by Amato & Creely to Judge Porteous amounted to approximately $20,000.

A Okay.

Q You know, it's good of you to come here, but we don't really need an expert witness to tell us there's a big problem here. Would you agree with that? Assuming that the evidence reflects what's

alleged by the House?

A Yeah. And I think my testimony is I agree with that. I mean, my view of not just these gifts but all these gifts from lawyers to judges are a problem. And you don't -- I don't need an expert to tell me that either.

Q But these rise above going to lunch a couple of few times or something like that. Would you agree with that?

A They are further to this end of the continuum (indicating), I would agree, yes.

Q And -- I'm sorry?

VICE CHAIRMAN HATCH: No, go ahead.

BY SENATOR RISCH:

Q And as far as the evidence in this case, have you reviewed this to -- and reviewed all of the -- not all, but the substance of the evidence against Judge Porteous regarding these allegations?

A Not all of it, no.

Q Enough that you got -- this gives you a little queasy feeling after looking at the evidence?

A I think I've already said that it does. And all of these gifts do.

Q Beyond the -- beyond the gifts, former Judge Bodenheimer testified here, and clearly laid

out the scheme that they have, which to me is stunning, where the bail bondsman goes in in the morning and meets with the family and the person in jail and finds out how much cash they can extricate them, then goes to the judge, gets the judge to set the appropriate bail.

The bail gets set, and then cash goes back or gifts go back or something to the judge.

Is that -- have you got a problem with that, from either an ethical standpoint or just overall?

A I've got a problem with all lawyer gifts to judges.

Q Lastly, are you familiar with the fact that Judge Porteous willfully, intentionally and knowingly falsified his name on a petition for bankruptcy that he filed?

A Yes.

Q Have you got a problem with that from an ethical standpoint?

A Yes.

Q Okay. Rises above just an ordinary ethical sort of difficulty. Would you agree with me on that?

A Yes.

SENATOR RISCH: That's all I have, Madam Chair.

VICE CHAIRMAN HATCH: Madam Chairman?

CHAIRMAN MC CASKILL: Senator Hatch.

EXAMINATION

BY VICE CHAIRMAN HATCH:

Q Just to kind the set the record straight on one matter. You said the scenario Mr. Baron described would be clearly unethical if there was a, quote, quid pro quo, unquote.

A And illegal.

Q Well, to go further, does there have to be a smoking gun or a literal phrase or a conversation to establish that quid pro quo?

A No. I mean, obviously in a criminal case, just evidence by -- beyond a reasonable doubt that there was a quid pro quo. So no, obviously I don't think there needs to be a smoking gun or anything like that. Circumstantial evidence would be, I would imagine, enough to convict in a criminal case.

VICE CHAIRMAN HATCH: Okay. Thank you. We appreciate your testimony.

SENATOR WICKER: Madam Chair?

CHAIRMAN MC CASKILL: Senator Wicker.

EXAMINATION

BY SENATOR WICKER:

Q Does the giving of $2000 from lawyers to a judge, during the pendency of a very important case, for the judge's son's wedding go beyond the normal practice in the community that you were testifying about?

A I would think so.

Q You would view that as how serious on a scale of 1 to 10?

A Oh, jeez. It's certainly toward the other end of the spectrum. It's from, if you put lunches and social hospitality toward the more benign end of the spectrum, it's certainly over at the other end. But again you have to take into account all of the facts and circumstances, the prior relationship.

So again, this is the problem with the standard, is we're just trying to figure out where to put it on the continuum.

But I would agree with you, it's toward the -- more toward the malignant end of the continuum. I know that kind of sounds like a weasely answer, but with one of these kinds of standards --

CHAIRMAN MC CASKILL: We're very comfortable with those kinds of answers in our line

of work.

(Laughter.)

SENATOR WICKER: Thank you.

CHAIRMAN MC CASKILL: Yes, Senator Kaufman.

EXAMINATION

BY SENATOR KAUFMAN:

Q The point about the lunches and the fact that people go to lunch and everybody can see them having lunches, I can understand that. But do you think most people assume that the judge is never paying for any of the lunches or is paying for like one out of a thousand? Isn't that a factor? You're at a restaurant, you're having lunch together, I understand that.

But you don't know, people in the lunchroom don't know that the judge is never paying for the lunch. Isn't that a factor in terms of whether it's ethical or not?

A I think historically judges, when they go to lunch with lawyers, generally didn't pay. I think there's much less of that going on today, thanks to the new rulemaking by the Louisiana Supreme Court.

But back in the day, I think most people

assumed that the judge wasn't going to pay.

SENATOR KAUFMAN: Thank you.

EXAMINATION

BY CHAIRMAN MC CASKILL:

Q Senator Wicker asked about the $2000. Let me give you a few more facts.

The lawyer -- it's a bench-tried case, and the case has been submitted to the judge. The judge is at the point where the judge could make a decision any day.

The lawyer involved is a good friend of the judge. They're social friends. They have known each other a long time.

The judge asks for several thousand dollars for a family need. The lawyer goes to his partner at his law firm and gets half of the money from him, who is also a good friend of the judge.

And finally, the lawyer admits that part of the reason he gave the money was because he had the case pending.

In your expert opinion, would that conduct be considered ethical under any circumstances?

A Well, I think that's conduct on that malignant end of the spectrum. And again, it's all a matter of who is determining where the line is,

whether it's ethical or unethical.

I draw my line way back here (indicating). So I do. But as I've said, I find most of this conduct, at least in my personal view, unethical. Whether others do, that's for others to determine.

Q And finally, I want to ask, and this may be an obvious question, but I think it needs to be asked.

There was a great deal of discussion during your testimony about the fact that the rules -- the per se rules changed. Would it be a fair conclusion that one of the rules -- reason the rules were changed was because there was an incredibly embarrassing amount of unethical behavior going on by the judiciary and some lawyers in the community where Judge Porteous served as a judge?

A I think that's part of it. But there are also parallel reforms going on that Governor Jindal had started in the administrative branch. And there was some pressure being brought by the legislature and the executive branch on the judiciary to conform their rules to what the executive branch and the legislative branch had to do.

So it was kind of a mix of that political dynamic, plus the bad press and other things from

the 24th JDC and elsewhere.

Q Isn't it fair to say the judiciary was drug along in this reform?

A No, I don't think that's -- I don't think they were drug along. I think that they -- you know, just like, I guess, history is kind of replete with situations where practices, de jure and de facto practices that have been long accepted, subsequent policymakers finally decide it's time to change. And I think the Louisiana Supreme Court got to that point in part because of all of this stuff that happened in the 24th JDC and in part because of the changes in other branches of the government.

Q And the 24th JDC is the Jefferson Parish?

A Yes, Jefferson Parish, yes.

CHAIRMAN MC CASKILL: Thank you. Any other questions?

You are released.

THE WITNESS: Thank you all.

(Witness excused.)

CHAIRMAN MC CASKILL: Let me do a few housekeeping before the lawyers leave and before our members leave.

We have now finished all but one witness that was listed for today. It appears to me we have

eight witnesses left. Assuming that you all can figure out a way not to call the custodian of records of something, which I'm hoping you guys can figure out how not -- no need to call a custodian of records.

MR. TURLEY: We've already figured that out. We will not need that.

CHAIRMAN MC CASKILL: Perfect. That's what we have left. We now know that there is going to be a Foreign Relations markup on Tuesday. They have changed it from Wednesday to Tuesday; correct? Am I correct? That will be -- so you all can plan your day on Tuesday and your Wednesdays, that hearing will be at 2:15 on Tuesday.

So that means we will have to adjourn for lunch and will adjourn for lunch at almost 1:00, and we will not return -- depending on how we can count noses, there's a possibility we won't return until 4:00.

If we have enough members without -- because I don't think we have a judiciary conflict. That's when we get in trouble because we've got enough members on both that we couldn't work today.

MR. TURLEY: Madam Chair, we'll be starting at 8:00 again or 8:30?

CHAIRMAN MC CASKILL: We will begin at 8:00. We will begin at 8:00 a.m. on Tuesday, the 21st. And obviously, all the members should plan on not scheduling things for Wednesday also, because with that hearing now at 2:15, it is unlikely that we'll get through all of the witnesses on Tuesday. We will probably have to use at least part of Wednesday to finish up. So if everyone will plan accordingly, that we'll need to be here on Wednesday also.

Is there anything --

SENATOR WICKER: Madam Chair, I realize it's unusual, but I wonder if the members of the committee could meet in camera around your chair for a question I'd like to pose off the record.

CHAIRMAN MC CASKILL: Okay.

(Discussion off the record.)

CHAIRMAN MC CASKILL: There isn't a Foreign Relations Committee. Hot off the presses. We have a vote at 2:15. So you should just assume that we will work according to the schedule that you have on Tuesday.

MR. TURLEY: I didn't mean to interrupt. Madam Chair, you mentioned eight witnesses. We only have six listed.

CHAIRMAN MC CASKILL: Let me count. I see Mamoulides, Tiemann, Griffin, Rees, Hildebrand, Mackenzie, Levenson and Barliant.

MR. TURLEY: Yes. Thank you for that clarification. We did move -- we did move some witnesses from today, I'm sorry to have bothered you with that.

CHAIRMAN MC CASKILL: No, that's fine. Not at all.

Let me say also for the members that I talked to the leader today, and I am optimistic that we will not have to vote on our report until we return on the 15th. And I will try to let you know that for sure next week. The 15th of November.

I had mentioned to some of you that we might have to travel back just to have a committee hearing to vote on whether or not the report of the evidence is objective, which is all we have to do. We don't make any recommendation to the Senate, other than providing them with a report of the evidence that is an objective analysis of what we have heard.

Is there anything that either party needs to bring up with us today?

MR. SCHIFF: Madam Chair, could you just

give us the update on the time remaining?

CHAIRMAN MC CASKILL: Oh, sure. That's a good idea.

MS. JOHNSON: Six hours and 50 minutes.

CHAIRMAN MC CASKILL: Why don't you give it to me so I can read it into the microphone, if you don't mind. Thank you.

The House has six hours and 50 minutes, and Judge Porteous has seven hours and 30 minutes.

Okay?

Let me just say that we would expect all witnesses to come within your time. And I know you have decisions to make about who will be called and won't be called. I just want to make sure that everyone realizes that we are assuming this would be all of the witnesses.

MR. TURLEY: We understand, thank you.

CHAIRMAN MC CASKILL: Okay. Thank you all very much, and if you need anything else over the weekend, you can get hold of staff. We will try to accommodate you.

I appreciate all of you very much. I think today went very well, and I appreciate all your cooperation. And thank you to the panel.

(Whereupon, at 6:08 p.m., the proceedings

were adjourned, to be reconvened at 8:00 a.m., on Tuesday, September 21, 2010.)

C O N T E N T S

-- continued --

C O N T E N T S (Continued)

E X H I B I T S